No. 2735

United States

Circuit Court of Appeals

For the Ninth Circuit.

PACIFIC CASUALTY COMPANY, a Corporation,
Plaintiff in Error,

vs.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States for the Northern District of California, Sitting at San Francisco.

AT LAW.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

Complaint.

To the Honorable District Court:

General Bonding & Casualty Insurance Company, a private corporation duly incorporated under the laws of the State of Texas, having its domicile in the city and county of Dallas, in said State, and being a citizen of said State, complains of Pacific Coast Casualty Company, a private corporation duly incorporated under the laws of the State of California, having its domicile in the city and county of San Francisco in said State, and being a citizen of said State, and it shows to the Court as follows the grounds of its complaint.

1.

1. On and prior to the 18th day of June, 1911, and thereafter, the defendant was engaged under license duly issued by the commissioner of insurance and banking of the State of Texas in carrying on within the State of Texas its business of casualty and

liability insurance, and Elmo Rock Company, a private corporation duly incorporated under the laws of the State of Texas, was engaged in carrying on within said State and particularly within the county of Kaufman in said State its business of quarrying and crushing rock. The plaintiff then was, and at all times since it has been engaged under license duly issued by the commissioner of insurance and banking of the State of Texas in carrying on within said State its business of acting [1*] as surety upon appeal bonds and other bonds, and its business of casualty and liability insurance.

2. On, to wit, June 18, 1911, for a valuable consideration, the defendant issued to said Elmo Rock Company a certain policy of employer's liability insurance numbered M. E. 36,696, bearing date June 18, 1911, whereof a copy marked exhibit "A," is attached hereto and made a part of this complaint. By said policy the defendant insured said Elmo Rock Company for the term of one year ending June 18, 1912, and to the extent of five thousand dollars on account of an accident to one person, against loss and expense arising from claims upon said Elmo Rock Company for damages on account of bodily injuries accidently suffered or alleged to have been suffered during the period of said policy by any employee of said Elmo Rock Company by reason of the prosecution of its work of quarrying and crushing rock, By said policy the defendant further agreed that if suit should be brought against said Elmo Rock

*Page-number appearing at foot of page of original certified Record.

Company upon account of an accident the defendant at its own expense would settle or defend such suit whether groundless or not, and that the moneys expended in such defense should not be included in the limits of the liability fixed by said policy. Said Elmo Rock Company duly performed all the conditions of said contract of insurance upon its part both generally and specially with relation to the particular liability hereinafter mentioned, and became entitled to all the benefits thereof both generally and specially with reference to the particular liability hereinafter mentioned.

2.

1. During the period of said policy, one J. B. Sowders, an adult employee of said Elmo Rock Company, accidently suffered bodily injuries by reason of the prosecution of the work of [2] quarrying and crushing rock by said Elmo Rock Company and by himself as its employee. For the recovery of damages on account of the bodily injuries so suffered or alleged to have been suffered by him, the said J. B. Sowders instituted in the district court of Kaufman County, Texas, an action against said Elmo Rock Company, entitled J. B. Sowders v. Elmo Rock Company, and numbered 5774 upon the docket of said court. Having been duly notified by Elmo Rock Company, entitled J. B. Sowders, v. Elmo Rock Company of the occurrence of such accident and the institution of such action, the defendant undertook to defend such action and took upon itself the entire management and control thereof to the exclusion of said Elmo Rock Company all in accord-

ance with the provisions of said policy. The trial of said action resulted in the rendition therein of June 19, 1912, by said District Court of Kaufman County, Texas, of a money judgment in favor of said J. B. Sowders and against said Elmo Rock Company for the principal sum of five thousand dollars, together with interest thereon at the rate of six per cent, per annum from and after said date and all costs incurred. Said judgment was duly given, and a copy thereof marked exhibit "B" is attached hereto and made a part of this complaint. Thereafter the defendant, through its attorneys at law in charge of the litigation and acting in the name of said Elmo Rock Company, duly moved for a new trial of said action, and their motion was duly overruledon to wit, July 19, 1912.

2. By a law of the State of Texas then in force, to wit by article 3715 of the Revised Civil Statutes of the State of Texas of 1911, it was made the duty of the clerk of the court to issue an execution upon said judgment upon the application of the successful party thereto after the expiration of twenty days from the rendition of said judgment and after the [3] overruling of said motion for new trial unless a supersedeas bond on appeal or writ of error should have been theretofore filed and approved. By another law of the State of Texas then in force, to wit by articles 2101 to 2103 inclusive, of said Revised Civil Statutes, said Elmo Rock Company, or the defendant acting in its name, was enabled to suspend the execution of said judgment pending its appeal therefrom by giving a supersedeas appeal

bond with two or more good and sufficient sureties, to be approved by the clerk of the court and payable to the appellee, in a sum at least double the amount of the judgment, interest and costs, conditioned that the appellant should prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals should be against it it should preform such judgment, sentence or decree and pay all such damages as said Court might award against it. By another law of the State of Texas then in force, to wit, by article 4929 of said Revised Civil Statutes, it was provided that such supersedeas appeal bond might be signed by a duly qualified surety company, such as was the plaintiff, instead of by two or more good and sufficient sureties as required by said article 2101. A copy marked exhibit "C" of said laws, to wit of said articles 3715, 2101 to 2103, inclusive and 4929. of the Revised Civil Statutes of the State of Texas of 1911, is hereto attached and made a part of this complaint.

3. Acting under the compulsion of said laws and of its obligations to said Elmo Rock Company under the terms of said policy, the defendant took steps to appeal from said judgment and to suspend the execution thereof pending such appeal, acting in so doing in the name of said Elmo Rock Company and [4] through its attorneys at law, Messrs. Meador & Davis, in charge of the litigation, and especially through John Davis, a member of said firm of Meador & Davis. To that end the defendant, acting through its said agent and attorney John Davis, who as the plain-

tiff is informed and believes, and therefore so alleges, was thereunto authorized, applied to the plaintiff to execute as surety the supersedeas appeal bond of said Elmo Rock Company in said action, and to induce the plaintiff to execute such bond it made and delivered to the plaintiff a contract of indemnity, whereof a copy marked exhibit "D" is attached hereto and made a part of this complaint. By said contract of indemnity the defendant agreed and bound itself to indemnify the plaintiff and keep it indemnified against any and all loss, costs, charges, counsel fees, damages and expenses whatever which the plaintiff should or might sustain, incur or be put to at any time by reason or in consequence of having executed said supersedeas bond as surety. The plaintiff is informed and believes and so alleges, the defendant with full knowledge of the acts of the said John Davis taken in its behalf as aforesaid approved such act, accepted the benefits thereof and ratified the same. The plaintiff is informed and believes and so alleges, the defendant held out the said John Davis to the plaintiff as having authority to deal with it in the usual course of business with reference to the matter of obtaining from it the execution of such supersedeas appeal bond and indemnifying the plaintiff against loss thereby incurred, and the plaintiff without notice of any defect in the authority of the said John Davis dealt with him in the usual course of business and in reliance upon the authority which he apparently possessed, and executed said supersedeas appeal bond in consideration [5] of the making of said con-

tract of indemnity and the payment by the defendant or in its behalf of the premium charged by the plaintiff for the making of such supersedeas appeal bond.

4. In consideration of the premium paid to it by or in behalf of the defendant therefor and in consideration of the execution and delivery to it of the aforesaid contract of indemnity, the plaintiff executed and delivered to the defendant's said attorneys at law for their use in appealing from the judgment hereinbefore described and in suspending the same, a supersedeas appeal bond in said action signed by itself as surety and through the procurement of the defendant signed by said Elmo Rock Company as principal, which bond was duly approved by the clerk of the court and filed among the papers of said action, rendering the appeal from and the suspension of said judgment effective. A copy of said bond and of the endorsed approval and file mark of the clerk of the court is marked exhibit "E" and attached hereto, and made a part of this complaint.

5. The appeal perfected as aforesaid was duly prosecuted by the defendant in the name of Elmo Rock Company and through the agency of its said attorneys at law, Meador & Davis. In the course of such appeal said judgment was affirmed by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas on to wit, March 15, 1913. On to wit, May 28, 1913, the Supreme Court of Texas denied a writ of error for which the defendant in the name of Elmo Rock Company had made application for the revision of said judgment of affirmance,

and on to wit, June 27, 1913, it overruled a motion for the rehearing of said application for writ of error. A copy of the judgment of the Supreme Court marked exhibit "F" is attached hereto, and made a part of this complaint. A copy of the judgment of the Supreme Court having been filed on to wit, July 5, 1913, in the office of [6] the clerk of said Court of Civil Appeals, said Court on to wit, August 12, 1913, duly issued its mandate to the said District Court of Kaufman County, commanding it to observe the order of said Court of Civil Appeals. Said order was in the nature of a judgment of affirmance of the judgment of said District Court hereinbefore set forth, with the additional judgment that the appellee J. B. Sowders have and recover from the appellant Elmo Rock Company and from the plaintiff, as its surety upon appeal bond, the amount adjudged below and all costs. Said mandate was duly filed in the office of the clerk of the District Court of Kaufman County, Texas, on to wit, August 18, 1913, and then for the first time the aforesaid judgment in favor of J. B. Sowders and against Elmo Rock Company became final in the sense that payment thereof was required and enforceable. A copy of said mandate and of the file mark of the clerk of the District Court of Kaufman County, Texas, thereon, marked exhibit "G," is attached hereto and made a part of this complaint.

6. Thereafter on to wit, August 19, 1913, a writ of execution was duly issued out of said District Court of Kaufman County, Texas, for the collection of said judgment and interest and costs, and on to

wit, September 5, 1913, the sheriff of Kaufman County, Texas, duly levied said execution upon a large amount of real and personal property as the property of said Elmo Rock Company, and advertised such property for sale at the door of the courthouse of Kaufman County on the 7th of October, 1913. Thereafter, without having sold the same, the sheriff turned said property over to W. D. Fletcher, as receiver for said Elmo Rock Company under orders of the District Court of Kaufman County, Texas, and made return of the writ of execution accordingly, also returning that no property of this plaintiff was found in his [7] county. Thereafter an *alias* writ of execution was duly issued out of the District Court of Kaufman County, commanding the sheriff of Dallas County to make the amount of said judgment and interest and costs out of the property of this plaintiff.

7. Thereafter, within ninety days from the date of the filing of mandate in said action in the District Court of Kaufman County, as hereinbefore set forth, and on to wit, October 22, 1913, at the instance and request of Elmo Rock Company acting through its said receiver W. D. Fletcher, and in behalf of said Elmo Rock Company, and under compulsion of the judgment rendered against this plaintiff in said action and said *alias* writ of execution issued against it, all as hereinbefore set forth, the plaintiff herein paid to the owners of said judgment in full settlement of the principal and interest thereof the sum of five thousand four hundred dollars and fifty cents, and in addition paid to the officers of court the taxed

costs in said action in the sum of one hundred sixty dollars and forty cents, making the aggregate sum of five thousand five hundred sixty dollars and ninety cents paid by the plaintiff in full settlement and discharge of said judgment and interest and costs thereto appurtenant.

3.

1. On to wit, September 17, 1913, the District Court of Kaufman County, Texas, in the cause entitled Mrs. Nellie Whitfield, Administratrix, vs. Elmo Rock Company et al., and numbered 6007 upon the docket of said court, duly gave an order appointing W. D. Fletcher receiver of said Elmo Rock Company, and directed that upon his taking the oath required by law and filing a sufficient bond in the sum of two thousand five hundred dollars, [8] which he did on to wit, September 20, 1913, he take possession of all the assets and properties of said Elmo Rock Company of every kind and character, and hold the same subject to the further order of said court. A copy of said order marked exhibit "H" is attached hereto, and made a part of this complaint. Thereafter, on to wit, October 31, 1913, and in said receivership suit last above mentioned, said District Court of Kaufman County, Texas, duly gave an order authorizing said receiver to assign and deliver to the plaintiff herein the policy of employer's liability insurance issued by the defendant herein and hereinbefore set forth. A copy of said order marked exhibit "I" is attached hereto, and made a part of this complaint. Thereafter, on

to wit, November 4, 1913, in pursuance of and by authority of the order of court last above mentioned, and in consideration of the payment theretofore made of said judgment by the plaintiff herein in behalf of said Elmo Rock Company, said W. D. Fletcher, as receiver for said Elmo Rock Company, duly assigned and transferred to the plaintiff herein the said policy of employer's liability insurance; and the plaintiff is now the owner and holder of said policy and of all the rights of said Elmo Rock Company thereunder. A copy of said assignment marked exhibit "J" is attached hereto, and made a part of this complaint.

4.

1. Thereafter, on to wit, November 28, 1913, the plaintiff caused to be presented to the defendant for payment a draft drawn by the plaintiff in favor of Locke & Locke upon the defendant for said sum of five thousand five hundred sixty dollars and ninety cents in full settlement of all obligations under said liability policy and under said contract of indemnity, both of which were attached to said draft. The defendant refused to pay said draft, and the same was duly protested by W. [9] W. Healey, a notary public in and for the city and county of San Francisco, State of California, on said date, November 28, 1913. A copy of said draft marked exhibit "K," and a copy of the certificate of protest marked exhibit "L," are attached hereto and made parts of this complaint.

5.

1. The contract of liability insurance and the

contract of indemnity hereinbefore set out were made in the State of Texas, and when they were made it was provided by a law of the State of Texas that on all written contracts ascertaining the sum payable when no specified rate of interest should be agreed upon by the parties to the contract, interest should be allowed at the rate of six per cent per annum from and after the time when the sum became due and payable. A copy of said law, to wit, of article 4977 of the Revised Civil Statutes of the State of Texas of 1911, marked exhibit "M" is attached hereto and made a part of this complaint.

6.

In consideration of the premises the plaintiff prays that the defendant be duly summoned to appear and answer this complaint, and that upon final hearing the plaintiff have judgment against the defendant for its debt and interest and costs i. e. for the sum of five thousand five hundred sixty dollars and ninety cents, with interest thereon at the rate of six per cent per annum from and after October 22, 1913, and the further sum of five dollars paid by the plaintiff as protest fees, and all costs of suit, and the plaintiff prays that it have all different or additional relief to which it may be justly entitled.

R. S. GRAY,
LOCKE & LOCKE,
Attorneys for Plaintiff.

Office, Room 342,
Mills Bldg.,
San Francisco, Calif. [10]

The State of Texas,
County of Dallas.

John B. Stephenson, first having been duly sworn, upon his oath says:

I am an officer, to wit*h* the president of General Bonding & Casualty Insurance Company, which is a private corporation incorporated under the laws of the State of Texas, and have read its foregoing complaint against Pacific Coast Casualty Company. Said complaint is true of my own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters I believe it to be true.

JOHN B. STEPHENSON.

Sworn to and subscribed by John B. Stephenson before me, this the 22d day of December, 1913.

[Seal] DANIEL K. SADLER,
Notary Public, Dallas County, Texas.

My commission expires June 1, 1915. [11]

Exhibit "A" [to Complaint—Policy of Insurance].

"No. M. E. 36696.

CAUSUALTY INSURANCE.

PACIFIC COAST CASUALTY COMPANY OF CALIFORNIA.

IN CONSIDERATION of the warranties herein and of Eighty-four and 00/100 Dollars ($84.00) estimated premium, the PACIFIC COAST CASUALTY COMPANY, of San Francisco, California, hereinafter called the Company, Hereby Insures THE ELMO ROCK COMPANY of the County of

Kaufman, State of Texas, hereinafter called the Assured, AGAINST LOSS AND EXPENSE ARISING FROM CLAIMS UPON THE ASSURED FOR DAMAGES ON ACCOUNT OF BODILY INJURIES ACCIDENTLY SUFFERED OR ALLEGED TO HAVE BEEN SUFFERED DURING THE PERIOD OF THIS POLICY BY ANY EMPLOYEE OF THE ASSURED by reason of the prosecution of the work described herein.

THIS INSURANCE IS SUBJECT TO THE FOLLOWING CONDITIONS:

A. The Company's liability on account of an accident to one person is limited to FIVE THOUSAND AND 00/100 dollars ($5,000); and, subject to the same limit for each person, the Company's total liability for an accident to more than one person is limited to TEN THOUSAND 00/100 dollars ($10,000).

Limits.

B. Upon the occurrence of an accident the Assured shall give to the Company, or to its duly authorized agent, immediate written notice thereof, with the fullest and most accurate information obtainable; and the Company, at its own expense, will make such investigation as it may deem necessary.

Reporting Accidents.

If a claim is made on account of an accident, the Assured shall give like notice thereof; and the Company, at its own expense, will settle or contest the same.

Reporting Claims.

If a suit is brought on account of an accident, the Assured shall forward immediately to the Company, or to its duly authorized agent,

Reporting Suits.

every process and paper served on him. The Company, at its own expense, will settle or defend said suit whether groundless or not; the moneys expended in said defense shall not be included in the limits of the liability fixed under this policy. The Assured shall not assume any liability, nor interfere with any negotiation for settlement or any legal proceeding, nor incur any expense nor settle any claim except at his own cost, without the written consent of the Company.

Co-operation of Assured.

C. The Assured shall render to the Company at all times all co-operation and assistance in his power. **[12]**

D. The premium for this policy is based on the entire compensation earned during the period of this policy by all employees of the Assured, engaged in the business or occupation herein stated not specifically excepted. Said entire compensation shall include salaries, wages, piece-work, over-time and allowances, whether paid wholly or in part by cash, store certificates, board, rentals, merchandise, credit or any other substitute for cash. At the end of the policy period, the Assured shall furnish the Company a written statement of the amount of said entire compensation earned by the employees. If such entire compensation exceeds the amount of the estimated compensation set forth herein, the Assured shall immediately pay the Company the balance of premium earned calculated on said excess at the rate named herein. If such entire compensation is less than the amount of said estimated compensation, the Com-

Basis of Premium.

pany shall pay the Assured the unearned premium calculated on the difference at the rate named herein; but the Company in any event shall retain the minimum premium stated herein.

E. Whenever requested the Assured shall furnish the Company a written statement of the amount of compensation earned by his employees during any part of the policy period. The Company shall have the right and be given opportunity at all reasonable times to examine all books and records of the Assured relating to the compensation earned by his employees, provided said examinations are made within one year from the expiration of the policy period. The rendering of any estimate or statement of compensation earned by employees or the payment of any premium estimated thereon, or the giving of any receipt for the payment of premium so estimated, shall not bar the examinations herein provided for, nor the right of the Company to the full amount of premium earned.

Pay-roll Reports and Credits.

F. This policy may be cancelled by either of the parties hereto, upon written notice stating a date not less than five (5) days thereafter when cancellation shall be effective. Said date shall then be the end of the policy period and the premium shall be computed and adjusted as provided in Clause D. hereof. If said cancellation is at the request of the Assured and he is not retiring from the business described herein the premium shall be calculated at the customary short rate. Whenever cancellation is at the request of the Assured, the Company is entitled to not less than the

Cancellation.

minimum premium stated herein.

G. The following statements numbered 1 to 9 inclusive are warranties by the Assured and are hereby made a part of and the basis of this contract, the estimated compensation of employees excepted.

1. Name of Assured—The Elmo Rock Company.
2. Address of Assured—Terrell, Texas.
3. The business or occupations to be insured: the specific location where work is to be done; the estimated compensation of the employees in each business or occupation; and the premium rate to be paid thereon are as follows: **[13]**

Business or Occupation.	Specific Location Where Work is to be Done.	Estimated Compensation.	Premium Rate.	Amount of Estimated Premium.
Quarrying and crushing rock.	Elmo, Texas	$4,200	2%	$84.00

NOTE.—If any employees shall be engaged in work which is of a greater hazard (judged by the rating in the Manual then in use by the Company) than the business or occupations above described, payment shall be made for said work at the premium rate provided for the same in said Manual; but ordinary alterations, additions and repairs are covered by this policy.

4. This policy covers, and the compensation specified above includes the compensation of drivers, drivers' helpers, collectors and messengers at or away from the locations above specified, cooks, helpers, common laborers, engineers, clerks, superintendents, officers (if a corporation) and all employed in connection with the above business or occupations, in any manner whatsoever, excepting: Officers.

5. No explosives or chemicals are used except as follows: 40% Dynamite and Gang Blasting Rock.

6. There are no elevators on the premises except as follows: No elevators.

7. There are no boilers on the premises except as follows: One 40 H. P.

8. This risk was carried during the past year by New risk.

9. This risk has never been refused or cancelled except as follows: No exceptions.

Exceptions.

H. This policy does not cover accidents to or caused by any minor employed in violation of law.

Audit.

I. The Assured agrees that the Company may audit his books and records as to compensation of employees, if done within one year after termination of the policy.

Miminum Premium.

J. The minimum premium for this policy shall be twenty-five and 00/100 dollars ($25.00).

Alterations. Agents.

K. This policy shall not be altered except by written endorsement signed by the President or Secretary of the Company, and attached hereto. Notice to an agent or knowledge possessed by an agent, or other person shall not effect a waiver or change in this policy. No person shall be deemed an agent of the Company unless authorized in writing by the Company.

Right of Recovery.

L. No action shall lie against the Company for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction

of a final judgment, within ninety days from the date of said judgment and after trial of the issue.

[14]

Policy Period.

M. The period of this policy shall be from the Eighteenth day of June, 1911, at noon, to the Eighteenth day of June, 1912, at noon, standard time, at the place where this policy is executed.

IN WITNESS WHEREOF, the PACIFIC COAST CASUALTY COMPANY has caused this Policy to be signed by its President and Secretary, but the same shall not be binding unless countersigned by a duly authorized agent of the Company.

F. A. ZANE, Secretary. E. F. GREEN, President.

Countersigned at Dallas, Texas, this 18th day of June, 1911.

MILLER-STEMMONS CO., General Agent."

The following clauses are pasted as riders on the first page of the policy.

"FORM L-23 9-10-1000

FIRST MEDICAL AID ENDORSEMENT

No. 5538

Date June 18th, 1911.

The final sentence of the last paragraph of Clause 'B' of this policy is hereby amended to read as follows:

'The Assured shall not assume any liability, nor interfere with any negotiation for settlement, or

any legal proceeding, nor incur any expense nor settle any claim, except at his own cost, without the written consent of the Company, except that the Assured may provide at the Company's expense such immediate surgical relief as is imperative at the time of the accident.'

Attached to and forming part of Policy No. M. E. 36696 issued by the PACIFIC COAST CASUALTY COMPANY, OF SAN FRANCISCO, CALIFORNIA, to The Elmo Rock Company.

Countersigned:

MILLER-STEMMONS CO.,
General Agent.
E. F. GREEN,
President."

FORM L-46 10-10-2000 No. 1948.

COMPENSATION LAW ENDORSEMENT

Date June 18th, 1911.

PACIFIC COAST CASUALTY COMPANY OF CALIFORNIA.

IN CONSIDERATION of the rate at which this Policy is written it is hereby understood and agreed that this Policy does not cover loss from the liability of the Assured under any Workmen's Compensation Law now existing, or hereafter enforced, during the term of this Policy.

Attached to and forming part of Policy No. M. E. 36696 issued by the PACIFIC COAST CASUALTY COMPANY, OF SAN FRANCISCO, CALIFOR-

NIA, to The Elmo Rock Company.

COUNTERSIGNED:

MILLER-STEMMONS CO.,
General Agent.
E. F. GREEN,
President." [15]

Exhibit "B" [to Complaint—Judgment].

In District Court, Kaufman County, Texas.

May Term, 1912.

June 19th, 1912.

No. 5774.

"J. B. SOWDERS

vs.

ELMO ROCK CO.

This day came on to be heard the above-entitled cause, and both parties having announced ready for trial, came a jury of good and lawful men, to wit, J. E. Barrett and eleven others who being duly sworn and empaneled according to law, who after hearing the pleadings read and all the evidence and argument of counsel, and after receving the charge of the Court retired to consider of their verdict; and after due deliberation thereon, returned into open court the following verdict, to wit: 'We, the jury, find for the plaintiff the sum of Five Thousand & no/100 Dollars ($5,000). J. E. BARRETT,
Foreman.

It is therefore ordered, adjudged, and decreed by the Court that the plaintiff J. B. Sowders, do have and recover of defendant, Elmo Rock Company, the sum of Five Thousand Dollars with six per cent in-

terest per annum thereon from this date, together with all cost incurred herein, for which execution may issue." [16]

Exhibit "C" [to Complaint—Statutes].

Revised Civil Statutes of the State of Texas of 1911.

Article 3715. "Execution before adjournment, when.—After the expiration of twenty days from and after the rendition of a final judgment in the District or County Court, and after the overruling of any motion therein for a new trial or in arrest of judgment, if no supersedeas bond on appeal or writ of error has been filed and approved, the clerk shall issue execution upon such judgment upon the application of the successful party."

Article 2101. "Supersedeas bond.—Should the appellant or plaintiff in error, as the case may be, desire to suspend the execution of the judgment, he may do so by giving, instead of the bond or affidavit in lieu thereof mentioned in the four preceding articles, or in addition to such bond, a bond with two or more good and sufficient sureties, to be approved by the clerk, payable to appellee or defendant in error, in a sum at least double the amount of the judgments, interest and costs, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect; and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against him, he shall perform its judgment, sentence or decree, and pay all such damages as said Court may award against him."

Article 2102. "Supersedeas bond.—Where judgment is for land or other property.—Where the

judgment is for the recovery of land or other property, the bond shall be further conditioned that the appellant or plaintiff in error shall, in case the judgment is affirmed, pay to the appellee or defendant in error the value of the rent or hire of such property in any suit which may be brought therefor."

Article 2103. "Judgment stayed and execution superseded.—Upon the filing of the bonds mentioned in the two preceding articles, the appeal or writ of error shall be held to be perfected, and the execution of the judgment shall be stayed, and should execution have been issued thereon, the clerk shall forthwith issue a supersedeas."

Article 4929. "Surety Company's bond is a legal bond, when.—Whenever any bond, undertaking, recognizance or other obligation is, by law or the charter, ordinances, rules or regulations of a municipality, board, body, organization, court, judge, or public officer, required or permitted to be made, given, tendered or filed with the surety or sureties, and whenever the performance of any act, duty or obligation, or the refraining from any act, is required or permitted to be guaranteed, such bond, undertaking, obligation, recognizance or guaranty may be executed by a surety company, qualified as hereinafter provided; and such execution by such company of such bond, undertaking, obligation, recognizance or guaranty shall be in all respects a full and complete compliance with every requirement of every law, charter, rule or regulation that such bond, undertaking, obligation, recognizance or guaranty shall be executed by one surety or by one

or more sureties, or that such sureties shall be residents, or householders, or freeholders, or either, or both, or possess any other qualification; provided, that nothing herein shall be construed [17] to permit any corporation to become a surety upon the official bond of any state or county official in this State and all courts, judges, heads of departments, boards, bodies, municipalities and public officers of every character shall accept and treat such bond, undertaking, obligation, recognizance or guaranty, when so executed by such company, as conforming to, and fully and completely complying with, every requirement of every such law, charter, ordinance, rule or regulation." [18]

Exhibit "D" [to Complaint—Contract of Indemnity].

"The State of Texas,

County of Dallas.

Whereas, heretofore, to wit, on the —— day of ——, the Pacific Coast Casualty Company of San Francisco, California, issued to the Elmo Rock Company of Terrell, Texas, an employer's liability policy, insuring said rock company against loss and expense arising from claims upon the assured for damages on account of bodily injuries suffered or alleged to have been suffered during the period of said policy by any employee of the assured by reason of the prosecution of the work described in said policy; and

Whereas, during the period of said policy, one of the employees of said assured, to wit, J. B. Sowders, was injured by reason of the prosecution of the work

described in said policy; and, whereas the said J. B. Sowders, brought suit against said rock company and recovered a judgment of $5,000 in the District Court of Kaufman County, Texas; and whereas the said Pacific Coast Casualty Company believes that said judgment is erroneous and that no liability exists by reason of said injury sustained by said Sowders, and has employed John Davis, an attorney at law, Dallas, Texas, to perfect an appeal from said judgment and prosecute the same to effect; and, whereas a supersedeas bond of $11,000 is required to perfect said appeal, and the General Bonding & Casualty Insurance Company of Dallas, Texas, in consideration of this agreement and other considerations, has agreed to execute said supersedeas bond as surety; Now,

Therefore, in consideration of said agreement and other good and valuable considerations, the said Pacific Coast Casualty Company does hereby agree and obligate and bind itself to indemnify, and keep indemnified, the said General Bonding & Casualty Insurance Company against any and all loss, costs, charges, counsel fees, damages and expenses whatever, which said bonding company shall or may sustain, incur or be put to at any time by reason or in consequence of having executed said supersedeas bond as surety.

Witness its hand, this 6th day of August, 1912.

PACIFIC COAST CASUALTY COMPANY.

By JOHN DAVIS,

Its Attorney at Law and in Fact." [19]

Exhibit "E" [to Complaint—Bond].

In the District Court of Kaufman County, State of Texas.

No. 5774.

"J. B. SOWDERS

vs.

ELMO ROCK COMPANY.

Whereas, in the above-entitled and numbered cause, pending in the District Court of Kaufman County, Texas, and at a regular term of said court, to wit, on the 18th day of June, A. D. 1912, the said J. B. Sowders recovered judgment against the said Elmo Rock Company for the sum of Five Thousand Dollars, with interest thereon from the 18th day of June, A. D. 1912, at six per cent per annum, and all costs of suit; and Whereas, on the 19th day of July, A. D. 1912, a motion theretofore filed by the said Elmo Rock Company praying for a new trial was overruled, to which action of the Court the said Elmo Rock Company, then and there excepted and gave notice of appeal to the Court of Civil Appeals of the 5th Supreme Judicial District at Dallas, Texas, and from which judgment the said Elmo Rock Company has taken an appeal to the Court of Civil Appeals for the 5th Supreme Judicial District at Dallas, in the County of Dallas,—

Now, therefore, we Elmo Rock Company, as principal, and ——— General Bonding & Casualty Ins. Co., as sureties, acknowledge ourselves bound to pay

said J. B. Sowders, the sum of Eleven Thousand Dollars, conditioned that the said Elmo Rock Company, a Corporation, appellant, shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, it, the said Elmo Rock Company, shall perform its judgment, sentence or decree, and pay all such damages as said Court may award against it.

Witness, our hands this the 6th day of August, A. D. 1912.

(L.S.) ELMO ROCK COMPANY.
By J. B. WHITFIELD,
Pres.

GENERAL BONDING & CASUALTY INS. CO.
By J. B. STEPHENSON,
President.

I have fixed the probable amount of costs of this suit in the Court of Civil Appeals, the Supreme Court and the court below at $200 and approve the foregoing bond.

This the 7th day of August, A. D. 1912.

L. D. SCARBOROUGH,
Clerk of the District Court Kaufman County, Texas.

Filed Aug. 7th, 1912. L. D. Scarborough, District Clerk Kaufman County, Texas." [20]

Exhibit "F" [to Complaint—Order Refusing Application for Writ of Error, etc.].

"In Supreme Court of Texas, from Kaufman County, Fifth District.

ELMO ROCK COMPANY

vs.

J. B. SOWDERS.

May 28, 1913.

This day came on to be heard the application of Elmo Rock Company, for a writ of error to the Court of Civil Appeals for the Fifth District, and the same having been duly considered, it is ordered that said application be refused. That the applicant Elmo Rock Company and its surety, General Bond & Casualty Insurance Company, pay all costs incurred on this application.

I, F. T. CONNERLY, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above-styled cause.

Witness my hand and seal of said court, this the 30th day of June, A. D. 1913.

[Seal] F. T. CONNERLY,
Clerk.

By ————————,
Deputy."

Motion for rehearing overruled June 27, 1913.

[Endorsed as follows]: "Application No. 8202. Elmo Rock Company vs. J. B. Sowders. Copy of Judgment in Supreme Court Application for Writ of Error Refused. Filed in Court of Civil Appeals Jul. 5, 1913. Geo. W. Blair, Clerk 5th District." [21]

Exhibit "G" [to Complaint—Mandate].

"THE STATE OF TEXAS.

To the District Court of Kaufman County, Greeting:

Before our Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, on the 15th day of March, A. D. 1913, the cause upon appeal to revise or reverse your Judgment between Elmo Rock Co., Appellant, No. 6840, and J. B. Sowders, Appellee, was determined; and therein our said Court made its order in these words:

'This cause came on to be heard on the transcript of the record, and the same being inspected, because it is in the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellee J. B. Sowders do have and recover of appellant Elmo Rock Company and General Bonding and Casualty Insurance Company its surety upon appeal bond the amount adjudged below and all costs in this behalf expended and this decision be certified below for observance';

WHEREFORE, WE COMMAND YOU to observe the order of our said Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, in this

behalf, and in all things have it duly recognized, obeyed and executed.

WITNESS, the Hon. ANSON RAINEY, Chief Justice of our said Court of Civil Appeals, with the seal thereof annexed, at the city of Dallas, this the 12th day of August, A. D. 1913.

[Seal] GEO. W. BLAIR,
Clerk.

By ————————,
Deputy."

[Endorsement as follows]: "No. 6840. Mandate Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, Dallas. Elmo Rock Co. vs. J. B. Sowders, Issued August 12, 1913. Geo. W. Blair, Clerk. Filed Aug. 18, 1913. By W. W. Franklin, Dist. Clerk to Kaufman County." [22]

Exhibit "H" [to Complaint—Order Appointing Receiver].

In the District Court of Kaufman County, Texas.
Sept. Term, A. D. 1913.
No. ——.

MRS. NELLIE WHITFIELD, Administratrix,
vs.
ELMO ROCK COMPANY et al.

The following order is endorsed on the petition in the above-entitled case.

"Sept. 17th, 1913.

This day came on to be heard the application of Mrs. Nellie Whitfield, administratrix of the estate of J. B. Whitfield, deceased, praying for the appoint-

ment of a Receiver for The Elmo Rock Company, a corporation duly organized under the laws of Texas and having its principal place of business at Elmo in Kaufman County, Texas; and it appearing to the Court from allegations in petition that said Elmo Rock Company is insolvent and that its assets are being wasted and dissipated and that there is no officer or other proper person in charge of the affairs of said corporation and that it is necessary that some one should be placed in charge thereof to preserve the property and wind up the business of said corporation; and it further appearing to the Court from said petition that said Elmo Rock Company is largely indebted; and it further appearing to the Court that W. D. Fletcher, a citizen of Terrell, Kaufman county, Texas, is a proper person to be appointed Receiver for said corporation:

It is therefore ordered by the Court that said W. D. Fletcher be, and he is hereby, appointed Receiver of said Elmo Rock Company, and his bond as such Receiver is fixed at the sum of $2,500; it is further ordered by the Court that upon the said W. D. Fletcher filing in this court his said bond with two good and sufficient sureties to be approved by this Court and taking the oath required by law, that he take possession of all the assets and properties of said The Elmo Rock Company of every kind and character, and that he hold same subject to the further orders of this Court.

F. L. HAWKINS,
Judge 40th Judicial District. [23]

Exhibit "H–2" [to Complaint—Bond of Receiver].

The State of Texas,
County of Kaufman.

KNOW ALL MEN BY THESE PRESENTS: That we, W. D. Fletcher, as principal, and Commonwealth Bonding & Casualty Ins. Co., as sureties, are held and firmly bound unto F. L. Hawkins, Judge of the 40th Judicial District of Texas, in the penal sum of Twenty-five Hundred ($2,500) Dollars, for the payment of which well and truly to be made, we herby bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas, the said W. D. Fletcher has been appointed by Hon. F. L. Hawkins, Judge of the 40th Judicial District of Texas, Receiver for the Elmo Rock Company, in the action of Mrs. Nellie Whitfield, Administratrix, vs. The Elmo Rock Company.

Now, if the said W. D. Fletcher shall faithfully discharge all of the duties of Receiver in said action, and obey *to* orders of the Court therein, then this obligation shall be null and void, otherwise to remain in full force and effect.

Witness our hands, this 19th day of September, A. D. 1913.

W. D. FLETCHER,
Commonwealth Bonding & Casualty Ins. Co.
By CLARENCE G. COFFEY,
Attorney in Fact.

The State of Texas,
County of Kaufman.

I, W. D. Fletcher, Receiver of The Elmo Rock Company, solemnly swear that I will faithfully perform all the duties of Receiver of said Elmo Rock Company, to the best of my skill and ability.

[Seal] W. D. FLETCHER.

Subscribed and sworn to before me, this the 18th day of September, A. D. 1913.

C. G. COFFEY,
Notary Public, Kaufman County, Texas.

Filed Sept. 20th, 1913, W. W. Franklin, District Clerk." [24]

Exhibit "I" [to Complaint—Order Authorizing Assignment].

No. 6007.

"MRS. MATTIE WHITFIELD, Administratrix,
vs.
ELMO ROCK COMPANY.

In District Court Kaufman County, Texas,
Oct. 31, 1913.

The Receiver of the Elmo Rock Company heretofore appointed by the Court is authorized by said Court to assign and deliver to the General Bonding and Casualty Insurance Company Policy No. M. E. 36,696 issued by the Pacific Coast Casualty Company to the Elmo Rock Company.

State of Texas,
Kaufman County.

I, W. W. Franklin, Clerk of the District Court of

Kaufman County, Texas, do hereby certify that the foregoing is a true and correct copy of the order entered on the 31st day of October, A. D. 1913, in the case of Mattie Whitfield vs. Elmo Rock Company.

Witness my hand and seal of office this the 4th day of November, 1913.

(L. S.) W. W. FRANKLIN,
Clerk District Court Kaufman County, Texas."
[25]

Exhibit "J" [to Complaint—Assignment].

"The State of Texas,
County of Kaufman.

WHEREAS, under date of June 18, 1911, Pacific Coast Casualty Company, a private corporation of San Francisco, California, for a valuable consideration executed and delivered to Elmo Rock Company, a private corporation of Kaufman County, Texas, its certain liability policy No. M. E. 36,696, whereby it insured said Elmo Rock Company for the term of one year against loss and expense arising from claims upon it for damages on account of bodily injuries accidently suffered or alleged to have been suffered during the period of said policy by any employee of said Elmo Rock Company, by reason of the prosecution of its work of quarrying and crushing rock. And whereas, on to wit, June 19, 1912, in the District Court of Kaufman County, Texas, in the cause entitled J. B. Sowders v. Elmo Rock Company, and numbered 5774 upon the docket of said court, said J. B. Sowders recovered against said Elmo Rock Company a money judgment for the sum of five thousand dollars, together with interest from and after

said date at the rate of six per cent, per annum, and all costs of suit. And whereas, the cause of action upon which said judgment was recovered was based upon bodily injuries accidently suffered, or alleged to have been suffered by said J. B. Sowders during the period of said policy, and while as an employee of said Elmo Rock Company he was engaged in the prosecution of its work of quarrying and crushing rock. And whereas, said Elmo Rock Company appealed from said judgment to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, and in connection with such appeal gave a supersedeas appeal bond in the sum of eleven thousand dollars executed by itself as principal and by General Bonding & Casualty [26] Insurance Company as surety. And whereas, said judgment in due course was affirmed by said Court of Civil Appeals, and a writ of error therefrom was denied by the Supreme Court of Texas. And whereas, on to wit, August 18, 1913, a mandate issued by said Court of Civil Appeals under date of August 12, 1913, was filed in the District Court of Kaufman County, Texas, and the judgment aforesaid of said District Court thereupon became final and binding. And whereas, on to wit, September 17, 1913, in a cause then pending in the District Court of Kaufman County, Texas, and entitled Mrs. Nellie Whitfield, administratrix, v. Elmo Rock Company, and numbered 6007 upon the docket of said court, W. D. Fletcher, of Terrell, Kaufman County, Texas, was by said court duly appointed receiver of said corporation, and directed to take possession of all the assets and properties of said Elmo

Rock Company of every kind and character, and hold the same subject to the further orders of said court. And whereas, said W. D. Fletcher has duly qualified by taking the oath of office and filing an approved bond in accordance with the requirements of the aforesaid order appointing him receiver, and is now the duly appointed, qualified and acting receiver in said cause. And whereas at the request of said W. D. Fletcher as receiver and in the discharge of its obligations as surety upon the supersedeas appeal bond aforesaid, said General Bonding & Casualty Insurance Company has on this 22d day of October, 1913, paid to the owners and holders of said judgment the amount due them thereon, to wit, the sum of five thousand four hundred dollars and fifty cents, and in addition has paid to the officers of court the costs taxed in said cause, to wit, the sum of one hundred sixty dollars and forty cents, thereby discharging said judgment in full as between said Elmo Rock Company and the owners and holders of said judgment other than said *said* General Bonding & Casualty Insurance Company itself. And whereas, [27] by virtue of the premises said General Bonding & Casualty Insurance Company has become subrogated to all the securities held by said Elmo Rock Company for the payment of the indebtedness represented by said judgment, and has become entitled to have all such securities duly transferred and assigned to it. And whereas, said W. D. Fletcher, as receiver, has been authorized and instructed by order of the District Court of Kaufman County, Texas, to assign and transfer said liability policy to said General

Bonding & Casualty Insurance Company, the same being a security held by Elmo Rock Company for the payment of the debt represented by said judgment.

Now, therefore, I, W. D. Fletcher, receiver for Elmo Rock Company, acting in its behalf, and under order of the District Court of Kaufman County, Texas, as aforesaid, do herby assign, transfer and set over unto General Bonding & Casualty Insurance Company, a private corporation of Dallas, Texas, the said liability policy number ME. 36,696, issued by Pacific Coast Casualty Company under date of June 18, 1911, to the Elmo Rock Company, together with all the right, title and interest of said Elmo Rock Company in and to said policy. This assignment is made without prejudice to any right which said General Bonding & Casualty Insurance Company may have against said Elmo Rock Company for its reimbursement otherwise than by means of said policy for the amount expended by it in the payment of said judgment, interest and costs.

In testimony whereof I have hereunto set my hand at Kaufman, Texas, this the 4th day of November, 1913.

W. D. FLETCHER,
Receiver for Elmo Rock Company. [28]

State of Texas,
County of Kaufman.

Before me, C. G. Coffey, a notary public in and for Kaufman County, Texas, on this day personally appeared W. D. Fletcher, known to me to be the person whose name is subscribed to the foregoing instrument of writing, and acknowledged to me that he execute

the same for the purposes and consideration and in the capacity therein stated.

Given under my hand and the seal of my office at Terrell, in Kaufman County, Texas, this the 4th day of November, 1913.

[Seal] C. G. COFFEY,
Notary Public, Kaufman County, Texas. [29]

Exhibit "K" [to Complaint—Draft].

Dallas, Texas, November 18, 1913,

Law Office of LOCKE & LOCKE, Dallas, Texas.

PAY TO THE ORDER OF Locke & Locke, on November 28, 1913, fixed $5,560.90, Five Thousand Five Hundred Sixty and 90/100 Dollars in full settlement of all obligations under your liability policy No. M. E. 36,696 issued June 18, 1911, to Elmo Rock Company and of your agreement of August 6, 1912, to indemnify General Bonding & Casualty Insurance Company for any loss incurred in consequence of its signing as surety a supersedeas appeal bond in the case of Sowders v. Elmo Rock Company, both policy and indemnity agreement being attached hereto.

GENERAL BONDING & CASUALTY INSURANCE COMPANY.

By J. B. STEPHENSON,
President.

To Pacific Coast Casualty Company,
San Francisco,
California." [30]

Exhibit "L" [to Complaint—Certificate of Protest].

"United States of America,
State of California,
City and County of San Francisco,—ss.

By this Public Instrument of Protest

BE IT KNOWN,

That on this 28th day of November, 1913, at request of

THE CROCKER NATIONAL BANK,
of San Francisco,

holder of the original draft which is hereto attached, I, W. W. Healey, a Notary Public in and for said city and county of San Francisco, aforesaid, residing therein, duly commissioned and sworn, did this day, in reasonable business hours, present said draft at the office of the Pacific Coast Casualty Company, Merchants Exchange Building, California Street in the city and county of San Francisco, State of California where said draft was made payable, and demand payment thereof, but the representative of said Pacific Coast Casualty Company, stated that the said draft was unauthorized, and that they would not pay said draft, therefore payment of said draft, drawn by General Bonding & Casualty Insurance Company, by J. B. Stephenson, President, maker of said draft, was refused.

WHEREUPON, I the said notary, at the request aforesaid did PROTEST, and by these presents do publicly and solemnly PROTEST, as well against the drawer or maker and endorsers of the said draft as

against all others whom it does or may concern, for all exchange or re-exchange, damages, costs, charges and interests, suffered or to be suffered, for want of payment of the said draft.

Thus done and protested, in the city and county of San Francisco on the day and year aforesaid.

In Testimony Whereof, I grant these presents under my signature, and the impress of my Seal of office, in the city and county of San Francisco on the day and year first above written.

[Seal] W. W. HEALEY,

Notary Public in and for the City and County of San Francisco, State of California.

I, the undersigned notary, do hereby certify that the parties to the draft which is hereto attached, have been duly notified of the protest thereof, by letters to them by me written and addressed, dated on the day of the said protest, and served on them respectively in the manner following, viz,: upon General Bonding & Casualty Insurance Company by J. B. Stephenson, President Dallas, Texas, maker of said draft, and upon Locke & Locke, Dallas, Texas, endorsers of said draft, such being the reputed places of residence or address of said respective parties and the postoffices nearest thereto, according to the best information I could obtain, all of said letters being properly folded, inclosed in envelopes, sealed and addressed as above stated, and deposited in the United States Postoffice at San Francisco, California, postage prepaid thereon.

IN FAITH WHEREOF, I have hereunto signed

my [31] name and affixed my official seal this 28th day of November, 1913.

[Seal] W. W. HEALEY,

Notary Public in and for the City and County of San Francisco, State of California." [32]

[Endorsed on back of protest]: "No. 2185. $5,560.90, Protest Nonpayment of draft. By General Bonding & Casualty Insurance Company. By J. B. Stephenson, President, Dallas, Texas. Upon Pacific Coast Casualty Company, San Francisco, Cal. Favor of Locke & Locke, Dallas, Texas. Order. The Crocker National Bank of San Francisco." [33]

Exhibit "M" [to Complaint—Statute].

Revised Civil Statutes of the State of Texas, of 1911.

Article 4977. "Six per cent the legal rate.—On all written contracts ascertaining the sum payable, when no specified rate of interest is agreed upon by the parties to the contract, interest shall be allowed at the rate of six per cent per annum from and after the time when the sum is due and payable."

[Endorsed]: Filed Dec. 27, 1913. Walter B. Maling, Clerk. [34]

Summons.

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California, Second Division.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

Action brought in said District Court, and the complaint filed in the office of the Clerk of said District Court, in the City and County of San Francisco.

R. S. GRAY,
LOCKE & LOCKE,
Plaintiff's Attorneys.

The President of the United States of America, Greeting: To Pacific Coast Casualty Company, Defendant.

You are hereby directed to appear, and answer the complaint in an action entitled as above brought against you in the District Court of the United States, in and for the Northern District of California, Second Division, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any moneys or damages demanded

in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the complaint.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 27th day of December in the year of our Lord one thousand nine hundred and thirteen and of our independence the one hundred and thirty-eight.

[Seal] WALTER B. MALING,
Clerk. [35]

United States Marshal's Office,
Northern District of California.

I hereby certify, that I received the within writ on the 29th day of Dec., 1913, and personally served the same on the 29th day of December, 1913, upon Pacific Coast Casualty Co. by delivering to, and leaving with Fred B. Lloyd, who is the General Manager of the Pacific Coast Casualty Co. Said defendant named therein personally at the city and county of San Francisco in said District a certified copy thereof, together with a copy of the complaint, certified to by ——, attached thereto.

San Francisco, December 29th, 1913.

C. T. ELLIOTT,
U. S. Marshal.
By Paul J. Arnerich,
Office Deputy.

[Endorsed]: Filed Jan. 3, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [36]

In the District Court of the United States, Northern District of California, Second Division.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

Demurrer.

Now comes the defendant above named and demurs to complaint of plaintiff on file in the above-entitled action, and for cause of demurrer specifies:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

That the above-entitled Honorable Court has no jurisdiction over the person of this defendant.

III.

That the above-entitled Honorable Court has no jurisdiction over the subject matter of the action as designated by plaintiff's complaint.

IV.

That several causes of action have been improperly united.

V.

That several causes of action have been improperly stated.

VI.

That this action is barred by the provisions of subdivision [37] L of the policy set forth by plaintiff in his complaint and marked exhibit "A."

VII.

That said complaint is uncertain in that it cannot be ascertained therefrom—

(a) Whether or not plaintiff is, or was at the time of the commencement of this action, licensed to do business in the State of California.

(b) Whether or not plaintiff is, or was at the time of the commencement of this action, engaged in doing business in the State of California.

(c) What if any knowledge plaintiff has that the Elmo Rock Company duly performed the conditions of its contract with the Pacific Coast Casualty Company.

(d) What if any knowledge plaintiff has that defendant was duly notified by the Elmo Rock Company of the occurrence of the accident mentioned by plaintiff in its complaint.

(e) How or in what manner or particular did John Davis, mentioned by plaintiff in its complaint, become the agent of defendant as alleged by plaintiff in its complaint.

(f) When, if at all, did this defendant engage Messrs. Meador and Davis as attorneys at law.

(g) When, if at all, did this defendant authorize John Davis to execute a contract of indemnity.

(h) When, if at all, this defendant held out John Davis to plaintiff as having authority to deal with it

in the usual course of business, as set forth by plaintiff in its complaint.

(i) What if any loss or expense the Elmo Rock Company suffered by reason of the action of J. B. Sowders against the [38] Elmo Rock Company, mentioned by plaintiff in its complaint.

VIII.

That said complaint is ambiguous in each and every manner and particular in which it is alleged to be uncertain.

IX.

That said complaint is unintelligible in each and every manner and particular in which it is alleged to be uncertain.

WHEREFORE, defendant prays that it be hence dismissed together with its cost of suit.

HAMILTON A. BAUER,
Attorney for Defendant.

The undersigned hereby certifies that the foregoing demurrer is well founded in law and not interposed for delay.

HAMILTON A. BAUER,
Attorney for Defendant.

[Endorsed]: Filed Jan. 5, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [39]

In the District Court of the United States for the Northern District of California, Sitting at San Francisco.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

Amended Demurrer.

Comes now the defendant above named and demurs to the complaint of plaintiff on file herein, and for grounds of demurrer states:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

That the above-entitled Honorable Court has no jurisdiction over the person of this defendant.

III.

That the above-entitled Honorable Court has no jurisdiction over the subject matter of the action as designated by plaintiff's complaint.

IV.

That several causes of action have been united in said complaint and have not been separately stated, to wit, an alleged cause of action upon an indemnity agreement set forth as exhibit "D," attached to said

complaint, with an alleged cause of action founded upon an insurance policy and an assignment thereof set forth as exhibits "A" and "J," attached to said complaint. [40]

V.

That several causes of action have been united in said complaint and have not been separately stated, to wit, an alleged cause of action by plaintiff as surety subrogated to the rights of the Elmo Rock Company, a corporation, and alleged cause of action on an agreement of indemnity alleged to have been executed by this defendant and above referred to, and an alleged cause of action as assignee of a policy issued by defendant to Elmo Rock Company.

VI.

That several causes of action have been improperly united, to wit, an alleged cause of action by plaintiff as surety subrogated to the rights of the Elmo Rock Company, a corporation, an alleged cause of action on an agreement of indemnity alleged to have been executed by this defendant and above referred to, and an alleged cause of action as assignee of a policy issued by defendant to Elmo Rock Company.

VII.

That the above-entitled action is barred by the provisions of subdivision "L" of the policy set forth by plaintiff in his complaint, and marked exhibit "A."

VIII.

That said complaint is uncertain in each and every of the following particulars:

a. That it cannot be ascertained therefrom whether the Elmo Rock Company sustained any loss

or expense from claims arising under the policy of Employers Liability Insurance referred to in said complaint, and marked exhibit "A."

b. That it cannot be ascertained therefrom whether [41] said Elmo Rock Company paid the judgment recovered in the Sowders case therein referred to.

c. That it cannot be ascertained therefrom whether this defendant defended said action brought by J. B. Sowders.

d. That it cannot be ascertained therefrom what terms insurance policy are referred to in lines 25 to 27, page 4, of said complaint.

e. That it cannot be ascertained therefrom whether this defendant authorized John Davis to sign the contract of indemnity, a copy of which is attached to said complaint, and marked exhibit "D."

f. That it cannot be ascertained therefrom in what manner this defendant held out John Davis to the plaintiff, as having authority to sign said contract of indemnity.

g. That it cannot be ascertained therefrom whether John Davis had any authority to represent this defendant other than as attorney and counselor at law.

h. That it cannot be ascertained therefrom in what respect said John Davis apparently possessed authority to affix the name of said defendant to said contract of indemnity.

i. That it cannot be ascertained therefrom whether this defendant did ever, by word or conduct hold out said John Davis as having authority in the

matter of obtaining bonds for this defendant.

j. That it cannot be ascertained therefrom in what respect this defendant ratified the said act of John Davis.

k. That it cannot be ascertained therefrom when the judgment in the case of Sowders against said Elmo Rock Company became final. [42]

l. That it cannot be ascertained therefrom whether the execution of said last-named action was ever levied upon any property of said Elmo Rock Company.

m. That it cannot be ascertained therefrom whether said John Davis was originally authorized to sign said contract of indemnity or whether said contract was signed without authority or subsequently ratified by this defendant.

n. That it cannot be ascertained therefrom when this defendant ratified the execution of said contract of indemnity.

o. That it cannot be ascertained therefrom what benefits, if any, were accepted by this defendant or received by this defendant as a result of the execution of said contract of indemnity.

p. That it cannot be ascertained therefrom under what *orders the* District Court of Kaufman County, Texas, the sheriff turned over the property levied upon by him to the receiver mentioned in said complaint.

q. That it cannot be ascertained therefrom what was the character of the proceedings referred to on page 9 of said complaint in which said W. D. Fletcher was appointed receiver.

r. That it cannot be ascertained therefrom whether the Elmo Rock Company was insolvent at the time of the appointment of the receiver as alleged in said complaint.

s. That it cannot be ascertained therefrom what, if any, authority the District Court of Kaufman County, Texas, possessed or had to authorize the assignment and delivery to plaintiff of the insurance policy referred to in said complaint.

IX.

Now that said complaint is unintelligible for each and all of the reasons set forth in paragraph eight, hereof. [43]

X.

That said complaint is ambiguous for each and all of the reasons set forth in paragraph eight hereof.

Therefore this defendant prays that plaintiff take nothing by its said complaint on file herein, and that this defendant may be dismissed hence with costs.

MYRICK & DEERING,
Attorneys for Defendant.

JAMES WALTER SCOTT,
Of Counsel.

I hereby certify that the foregoing demurrer is not interposed for the sake of delay and is in my opinion well taken in point of law.

JAMES WALTER SCOTT,
Of Counsel.

Service of the within amended demurred admitted (on the understanding that defts. points and author-

ities will be served to-morrow) this 14th day of January, 1914.

R. C. GRAY,
LOCKE & LOCKE,
Attys. for Plff.

[Endorsed]: Filed Jan. 17, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [44]

At a stated term, to wit, the November term, A. D. 1913, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Wednesday, the 18th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable FRANK S. DIETRICH, District Judge for the District of Idaho, designated to hold and holding this Court.

No. 15,723.

GENERAL BONDING & CASUALTY CO.,

vs.

PACIFIC COAST CASUALTY CO.,

Order Overruling Amended Demurrer in Part and Sustaining Amended Demurrer in Part.

Defendant's amended demurrer to the complaint, heretofore heard and submitted being now fully considered and the Court having filed its memorandum decision thereon, it was ordered that said amended demurrer be and the same is hereby overruled in

part and sustained in part, with leave to amend within five days in accordance with said decision. **[45]**

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,723.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

Answer to Complaint.

Comes now the above-named defendant, Pacific Coast Casualty Company, a Corporation, and answers the complaint of plaintiff on file herein as follows:

Defendant denies that said Elmo Rock Company duly, or at all, performed all or any of the conditions of said contract of insurance upon its part to be performed, both generally and specially with relation to the particular liability mentioned in said complaint, or either generally or specially with relation to the particular liability in said complaint mentioned, and defendant denies that said Elmo Rock Company become or was entitled to all or any of the benefits of said contract of insurance with reference to the particular liability mentioned in said complaint.

Defendant has not sufficient information or belief

upon the subject to enable it to answer the allegations contained in paragraph 2, subdivision 1, thereof, and placing its denial upon said ground this defendant denies that during the period of said policy one, J. B. Sowders, accidentally, or at all, suffered bodily injuries by reason of the prosecution of the work of quarrying and crushing rock, or quarrying or crushing rock, by said Elmo Rock Company, and by himself as employee, or [46] by said company or by himself as an employee, and denies that he was an employee of said Elmo Rock Company.

Defendant has no information or belief upon the subject matter of the allegations contained in paragraph 2, subdivision 2, of said complaint, and placing its denial upon said ground defendant denies that by a law of the State of Texas in force in the year 1912, or by any law of the State of Texas, it was made the duty of the clerk of the court to issue an execution upon the judgment referred to on page 3 of said complaint, or upon any judgment, upon application of the successful party in the action referred to on said page 3, after the expiration of twenty days from the rendition of said judgment, or at any other time, or at all, or after the overruling of said motion for new trial referred to in said complaint, unless a supersedeas bond on appeal or writ of error should have been theretofore filed and approved, or filed or approved.

Defendant denies that under the compulsion of the laws referred to on page 4 of said complaint, or any laws, or under the compulsion of its obligations to said Elmo Rock Company under the terms

of the policy referred to in said complaint, or under any compulsion whatsoever, or at all, this defendant took steps to suspend the execution of said judgment referred to in said complaint pending the appeal therein referred to, and denies that this defendant took steps to suspend the execution of the judgment therein referred to pending the appeal referred to in said complaint, and this defendant denies that it took steps to suspend the execution of said judgment either in the name of said Elmo Rock Company, or in any other name, or at all; and this defendant denies that through its attorneys at law, Messrs. [47] Meador & Davis, or through John Davis, or through any other person or persons, or at all, it took steps, or any steps, to suspend the execution of the judgment referred to in said complaint, and defendant denies that John Davis was authorized to apply to plaintiff to execute the supersedeas bond on appeal in said action, and denies that John Davis was authorized by defendant to induce the plaintiff to execute such bond, and denies that through said John Davis, or through any other person, or at all, defendant made and delivered, or made or delivered, to plaintiff, a contract of indemnity, a copy of which is exhibit "D," or any other contract of indemnity whatsoever, or at all; defendant denies that it executed said contract of indemnity, and denies that it authorized any other person or persons to execute said contract of indemnity, and denies that it agreed and bound itself, or agreed *and* bound itself, to indemnify the plaintiff, or keep it indem-

nified, as alleged in said complaint, or in any other manner, or at all; and defendant denies that it accepted the benefits of the alleged act of said John Davis and ratified the same, or ratified the same; and defendant denies that it had, at the time of said acts, or at any of the times alleged in said complaint, knowledge of the acts of said John Davis, and defendant denies that it held out the said John Davis to the plaintiff, or any other person, or at all, as having authority to deal with plaintiff in the usual course of business, or in any other manner, or at all, with reference to the matter of obtaining from it the execution of such supersedeas appeal bond, and indemnifying plaintiff against loss thereby incurred; and defendant denies that it at any time, or at all, held out said John Davis to plaintiff, or to any other person, or at all, as having authority to deal with plaintiff in the usual or any course of business, or at all, with reference [48] to the matter of obtaining from plaintiff the execution of such or any bond, or indemnifying plaintiff against loss thereby incurred; and this defendant is informed and believes, and placing its denial upon such information and belief denies that plaintiff without notice of defect in the authority of said John Davis dealt with him either in the usual course of business, or in any other way, or at all, and denies that it executed said bond in reliance upon any authority which he apparently possessed, and denies that he apparently possessed any authority in the premises; and placing its allegations upon said information and belief this defendant alleges that

said plaintiff dealt with said John Davis with full notice and knowledge of the fact that said John Davis did not have any authority to obtain said supersedeas bond from plaintiff, or to enter into any transactions on behalf of defendant with plaintiff relating to said supersedeas appeal bond, or relating to any other matter at all, and that said plaintiff had express written notice of the fact that said John Davis did not have such authority, and said plaintiff had said express written notice prior to the execution by plaintiff of said supersedeas bond, and prior to the making of said alleged contract of indemnity.

And this defendant has not sufficient information or belief upon the subject to enable it to answer the remaining allegations of subdivision 3, paragraph 2, of said complaint, and placing its denial upon said ground this defendant denies that it has paid plaintiff the premium charged by plaintiff for the making of such bond, or that said premium has been paid on behalf of this defendant, or that the same has been paid with the authority from this defendant. [49]

This defendant has not information or belief upon the subject sufficient to enable it to answer the allegations contained in subdivision 4, paragraph 2, of said complaint, and placing its denial upon said ground this defendant denies that in consideration of any premium paid to plaintiff by or on behalf of defendant, or in consideration of the execution or delivery of the contract of indemnity referred to in said complaint, plaintiff executed and deliv-

ered, or executed or deilvered to defendant's said attorneys at law a supersedeas bond in the action referred to in said complaint, and placing its denial upon the same ground defendant denies that it procured Elmo Rock Company to sign said bond, and denies that said Elmo Rock Company signed said bond as principal, or otherwise, and denies that said bond was duly or at all approved by the clerk of the court, and filed among the papers in said action, or approved by the clerk of the court, or filed among the papers in said action, and denies that exhibit "H" is a copy of said bond, or that the approval or file marks of the clerk of said court appear, or that a copy of them appears, on said exhibit "E."

Defendant has not information or belief upon the subject sufficient to enable it to answer the allegations contained in subdivision 5, paragraph 2, of said complaint, and placing its denial upon said ground defendant denies that the judgment therein referred to was affirmed by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas on March 15, 1913; and denies that on May 28, 1913, the Supreme Court of Texas, denied a writ of error; and denies that on June 27, 1913, the Supreme Court of Texas overruled a motion for the rehearing of said application for writ of error; and denies that Exhibit "F" is a copy [50] of the judgment of the Supreme Court of Texas, or any judgment of said Supreme Court; and denies that a copy of said judgment of the Supreme Court of Texas was filed on July 5, 1913, in the office of the clerk of said Court of Civil Appeals; and denies

that said Court of Civil Appeals on August 12, 1913, issued a mandate to the District Court of Kaufman County commanding it to observe the order of said Court of Civil Appeals; and denies that said or any order was in the nature of a judgment of affirmance of the judgment of said District Court referred to in said complaint; and denies that the order was in the nature of a judgment of affirmance of said or any judgment or contained an additional judgment that the appellee, J. B. Sowders, have and recover, or have or recover, from appellant, Elmo Rock Company, and from plaintiff, or from plaintiff, as its surety, or otherwise, the amount adjudged below, and all costs, or the amount adjudged below or all costs; and denies that said or any mandate was duly or at all filed in the office of the clerk of the District Court of Kaufman County, Texas, on August 18, 1913, or at any other time, or at all; and denies that then for the first time the judgment in favor of Sowders, and against Elmo Rock Company, became final in the sense referred to in said complaint, or in any sense whatsoever, or at all; and denies that exhibit "G" is a copy of said or any mandate, and of the file marks of the clerk, or of the file marks of the clerk of the said District Court.

This defendant has not information or belief upon the subject sufficient to enable it to answer the allegations contained in subdivision 6, of paragraph 2, of said complaint, and placing its denial upon said ground this defendant denies that on August 19, 1913, or at any other time, or at all, a writ of execution was duly or at all issued out of said Dis-

trict Court of [51] Kaufman County, Texas, for the collection of the judgment, and interest and costs referred to in said complaint, or for the collection of the judgment, interest or costs therein referred to; and denies that on September 5, 1913, the sheriff of Kaufman County, Texas, duly, or at all, levied said execution upon a large amount of real and personal property as the property of said Elmo Rock Company, or upon a large or any amount of real or personal property, as the property of said Elmo Rock Company, or upon any property whatsoever, or at all; and denies that said sheriff advertised property, or any property, for sale at the time and place referred to in said complaint, or at any other time or place whatsoever; and denies that thereafter, or at all, the sheriff, either with or without having sold the same, turned said or any property over to W. D. Fletcher, as receiver for said Elmo Rock Company; and denies that said act, or any act, was done by said sheriff under orders of the District Court of Kaufman County, Texas; and denies that said sheriff made return of the writ of execution either as mentioned in said complaint, or at all; and denies that thereafter, or at all, an alias writ of execution was duly or at all issued out of the District Court of Kaufman County commanding the sheriff of Dallas County to make the amount of said judgment, and interest, and costs, or commanding the said sheriff to make the amount of said judgment, or interest, or costs, out of the property of this plaintiff.

Defendant has no information or belief upon the

subject sufficient to enable it to answer the allegations contained in subdivision 7, paragraph 2, of said complaint, and placing its denial upon said ground this defendant denies that within ninety, or any, days from the date of the filing of mandate in said action **[52]** in the District Court of Kaufman County, or at any other time, or at all, plaintiff paid to the owners of said judgment the sum of Five Thousand Four Hundred and 50/100ths ($5,400.50) sion of said alias writ of execution issued against and denies that said or any payment was made by plaintiff at the instance and request, or at the instance or request, of Elmo Rock Company acting through its receiver, W. D. Fletcher, or at all; and denies that said or any payment was made at said or any other time on behalf of said Elmo Rock Company; and denies that said or any payment was made under compulsion of the judgment rendered against plaintiff in said action, or under the compul- Dollars, or any sum of money whatsoever, or at all; plaintiff; and denies that plaintiff paid to the officers of court the taxed costs in said action in the sum of One Hundred and Sixty and 40/100ths ($160.40) Dollars, or in any sum of money whatsoever, or at all; and denies that plaintiff paid the sum of Five Thousand Five Hundred and Sixty and 90/100ths ($5,560.90) Dollars in full settlement, or any settlement, and discharge, or in full or any settlement or discharge, of said or any judgment, and interest and costs, or said or any judgment, or interest, or costs.

And this defendant has no information or belief upon the subject sufficient to enable it to answer

the allegations contained in paragraph 3 of said complaint, and placing its denial upon said ground this defendant denies that on September 17, 1913, or at any other time, or at all, the District Court of Kaufman County, Texas, in the cause referred to in said paragraph of said complaint, gave an order appointing W. D. Fletcher, Receiver of said Elmo Rock Company, and directed that upon his taking the oath required by law, and filing a sufficient bond in **[53]** the sum of Twenty-five Hundred ($2500) Dollars, he take possession of all or any the assets and properties of said Elmo Rock Company, and hold the same subject to the further order of said Court: and denies that on September 17, 1913, said Court in said cause duly, or at all, gave an order appointing said Fletcher, receiver of said company, or directing that upon his taking said oath, or filing said bond, he take possession of all the assets or properties of said company, or hold the same subject to the further order of said Court: and denies that said W. D. Fletcher took oath, or filed said bond, on September 20, 1913; and denies that exhibit "H" is a copy of said or any order of said Court; and placing its denial upon said ground this defendant denies that thereafter, or on October 31, 1913, or at all, in said receivership suit mentioned in said paragraph, or in any other action, or at all, said District Court of Kaufman County gave an order authorizing said receiver to assign and deliver, or assign or deliver, to plaintiff the policy of employer's liability insurance referred to in said complaint; and denies that exhibit "I" is a copy of

said or any order of said Court: and placing its denial upon said ground defendant denies that on November 4, 1913, in pursuance of and by authority of the order of the Court referred to in said paragraph, or in pursuance of or by authority of the order of any Court whatsoever, or at all, and in consideration of the payment therein alleged to have been made by plaintiff, or in consideration of any payment made by plaintiff, or for any consideration whatsoever, or at all, said W. D. Fletcher, as Receiver for said Elmo Rock Company, assigned and transferred, or assigned or transferred to plaintiff the said policy of employer's liability insurance; and denies that plaintiff is now the owner and holder, or owner or holder, of said policy, and of all or any of the rights of said Elmo Rock Company thereunder, or [54] of all or any the rights of said Elmo Rock Company thereunder, and denies that exhibit "J" is a copy of said assignment referred to in said complaint, or a copy of any assignment whatsoever.

Defendant denies that the contract of indemnity referred to in said complaint was made in the State of Texas, or at all.

And for a further and separate defense to said cause of action in said complaint contained this defendant alleges that the payment of the judgment against the Elmo Rock Company, referred to in said complaint, and of the judgment against plaintiff herein in said complaint referred to, was made by plaintiff as a volunteer, and not otherwise.

And for a further and separate defense to the cause

of action set forth in plaintiff's complaint herein this defendant alleges that said cause of action is barred by the provisions of the policy of insurance issued by this defendant, a copy of which is attached to said complaint, and marked exhibit "A," to which reference is hereby expressly made, and which is by said reference made a part hereof, and especially by the provisions of paragraph L of said policy of insurance.

And for a further and separate defense to said cause of action set forth in said complaint this defendant alleges that in and by the policy of insurance above referred to, this defendant insured the Elmo Rock Company, of the county of Kaufman, State of Texas, against loss and expense arising from claims upon the assured for damages on account of bodily injuries accidently suffered, or alleged to have been suffered, during the period of said policy, by any employee of the assured, subject to the terms and conditions and limitations in said policy contained, and more particularly set forth therein, and this defendant alleges that [55] the said assured has never, as plaintiff is informed and believes suffered any loss and expense, or loss or expense from such claim or claims, and alleges that no liability on the part of this defendant has ever attached under said policy.

WHEREFORE this defendant prays that plaintiff take nothing by its said complaint, and that this defendant be dismissed hence with costs of suit; and for such other and further relief as to this Honorable

Court may seem meet and proper in the premises.

MYRICK & DEERING,
Attorneys for Defendant.
JAMES WALTER SCOTT,
Of Counsel.

State of California,
City and County of San Francisco,—ss.

J. M. Hoyt, being duly sworn, deposes and says: That he is the assistant secretary of Pacific Coast Casualty Company, defendant in the above-entitled action; that he has read the foregoing answer to complaint, and knows the contents thereof, that the same is true of his own knowledge, except as to matters therein stated on information or belief, and as to those matters that he believes it to be true.

J. M. HOYT.

Subscribed and sworn to before me this 12th day of March, 1914.

[Seal] M. I. LAWRENCE,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires January 27, 1918. [56]

Due service of the within answer to complaint, and receipt of a copy, is hereby admitted this 12th day of March, 1914.

LOCKE & LOCKE and
R. S. GRAY,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 12, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [57]

[Stipulation Waiving Jury.]

In the District Court of the United States, Northern District of California.

GENERAL BONDING & CAS. CO.

vs.

PACIFIC COAST CASUALTY CO.

It is hereby stipulated that a jury is waived herein.

MYRICK & DEERING,
JAMES WALTER SCOTT,
Attorneys for Defdt.
LOCKE & LOCKE,
R. S. GRAY,
Attys. for Plff.

[Endorsed]: Filed Sept. 11, 1914. Walter B. Maling, Clerk. [58]

At a stated term, to wit, the March term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held in the courtroom in the City and County of San Francisco, on Monday, the 15th day of March, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,723.

GENERAL BONDING & CASUALTY INS. CO.

vs.

PACIFIC COAST CASUALTY CO.

Order Denying Defendant's Motion for a Nonsuit, etc.

Defendant's motion for a nonsuit and this cause; heretofore heard and submitted, being now fully considered and the Court having filed its memorandum opinion, it is ordered that said motion for nonsuit be and the same is hereby denied and that judgment be entered in favor of plaintiff and against defendant in the sum of $6,160.43 and for costs. [59]

[Notice of Motion for Order Directing that Findings be Prepared.]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,723.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

To the above-named Plaintiff, and to R. S. Gray, Esq., and Messrs. Locke & Locke, Its Attorneys:

You are and each of you is hereby notified that on Monday, the 22d day of March, 1915, at the hour of ten o'clock A. M. of said day, or as soon thereafter as counsel may be heard in the courtroom of the above-entitled court, Division No. 2, thereof, in the

Postoffice building, on Seventh Street, near Market Street, in the City and County of San Francisco, State of California,the above-named defendant will move the above-entitled Honorable Court to give and make an order directing that Findings be prepared in the above-entitled cause;

Said motion will be made upon the ground that the making of such findings will facilitate the presentation of the case to the above-entitled court on motion for new trial, and also on appeal if an appeal be taken herein.

Said motion will be based upon this notice of motion, the affidavit of James Walter Scott, a copy of which is served [60] herewith, and upon the records, papers, pleadings and files in the above-entitled action.

Very respectfully yours,
MYRICK & DEERING,
JAMES WALTER SCOTT,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 18, 1915. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [61]

At a stated term, to wit, the March term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held in the courtroom in the City and County of San Francisco, on Monday, the 29th day of March, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,723.

GENERAL BONDING & CASUALTY INS. CO.

vs.

PACIFIC COAST CASUALTY CO.

Order Granting Defendant's Motion for Order for Special Finding, etc.

By consent of plaintiff it was ordered that defendant's motion for order for special findings be granted and that the entry of judgment be continued and judgment entered on the findings. [62]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,723—AT LAW.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

Findings of Fact.

The above-styled cause was tried in September, 1914, before the Honorable WM. C. VAN FLEET, District Judge, without a jury, trial by jury having been waived by written stipulation signed by the attorneys for both parties, duly filed and presented in open court.

The cause was submitted September 15, 1914, upon

the evidence, with direction by the Court that written arguments be filed by both parties.

The Court does now make the following

FINDINGS OF FACT.

1.

1. The plaintiff, General Bonding & Casualty Insurance Company, is a Texas corporation domiciled at Dallas, Texas, and a citizen of Texas. The defendant, Pacific Coast Casualty Company, is a California corporation domiciled at San Francisco, California, and a citizen of California.

2. On all pertinent dates the defendant was lawfully engaged as an insurance company in issuing policies of employer's liability insurance in Texas, and the plaintiff was lawfully engaged as a surety company in making judicial bonds, and especially supersedeas appeal bonds, in Texas, and Elmo Rock [63] Company was a Texas corporation engaged in quarrying and crushing rock.

2.

3. On June 18, 1911, the defendant for a premium duly paid issued to Elmo Rock Company its policy of employer's liability insurance No. M. E. 36,696, whereof the portions relevant to this litigation read as follows:

"IN CONSIDERATION of the warranties herein and of Eighty-four and 00/100 Dollars ($84.00) estimated premium, the PACIFIC COAST CASUALTY COMPANY, of San Francisco, California, hereinafter called the Company,

Hereby Insures

THE ELMO ROCK COMPANY

of the County of Kaufman, State of Texas, hereinafter called the Assured,

AGAINST LOSS AND EXPENSE ARISING FROM CLAIMS UPON THE ASSURED FOR DAMAGES ON ACCOUNT OF BODILY INJURIES ACCIDENTALLY SUFFERED OR ALLEGED TO HAVE BEEN SUFFERED DURING THE PERIOD OF THIS POLICY BY ANY EMPLOYEE OF THE ASSURED by reason of the prosecution of the work described herein.

THIS INSURANCE IS SUBJECT TO THE FOLLOWING CONDITIONS:

Limits. A. The Company's liability on account of an accident to one person is limited to FIVE THOUSAND and 00/100 Dollars ($5,000); and, subject to the same limit for each person, the Company's total liability for an accident to more than one person is limited to TEN THOUSAND and 00/100 Dollars ($10,000).

Reporting Accidents. B. Upon the occurrence of an accident the Assured shall give to the Company, or to its duly authorized agent, immediate written notice thereof, with the fullest and most accurate information obtainable, and the Company, at its own expense, will make such investigation as it may deem necessary.

Reporting Claims. If a claim is made on account of an accident, the Assured shall give like notice thereof; and the Company, at its own expense, will settle or contest the same..

Reporting Suits. If a suit is brought on account of an accident, the Assured shall forward immediately to the Company, or to its duly authorized agent, every process and paper served on him. The Company, at its own expense, will settle or defend said suit whether groundless or not; the moneys expended in said defense shall not be included in the limits of the liability fixed under this policy. The Assured shall not assume any liability, nor interfere with any negotiation for settlement or any legal proceeding, nor incur any expense nor settle any claim except at his own cost, without the written consent of the Company.

Co-operation of Assured. C. The Assured shall render to the Company at all times all co-operation and assistance in his power."

"3. The business or occupations to be insured; the specific location where work is to be done; the [64] estimated compensation of the employees in each business or occupation; and the premium rate to be paid thereon are as follows:

Business or Occupation.	Specific Location Where Work is to be Done.	Estimated Compensation.	Premium Rate.	Amount of Estimated Premium.
Quarrying and crushing rock.	Elmo, Texas	$4,200	2%	$84.00"

"4. This policy covers, and the compensation specified above includes the compensation of drivers, drivers' helpers, collectors and messengers at or away from the locations above specified, cooks, helpers, common laborers, engineers, clerks, superintendents, officers (if a corporation) and all employed in connection with the above business or occupation, in any

manner whatsoever, excepting: Officers."

"Right of Recovery. L. No action shall lie against the Company for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment, within ninety days from the date of said judgment and after trial of the issue.

Policy Period. M. The period of this policy shall be from the Eighteenth day of June, 1911, at noon, to the Eighteenth day of June, 1912, at noon, standard time, at the place where this policy is executed.

IN WITNESS WHEREOF, the PACIFIC COAST CASUALTY COMPANY has caused this Policy to be signed by its President and Secretary, but the same shall not be binding unless countersigned by a duly authorized agent of the Company.

E. F. GREEN,
President.

F. A. ZANE,
Secretary.

Countersigned at Dallas, Texas, this 18th day of June, 1911.

MILLER-STEMMONS CO.,
General Agent."

4. Said policy was issued through the defendant's agents at Dallas, Texas, Miller-Stemmons Company, a firm of which W. L. Leeds was the managing partner. Miller-Stemmons Company were acting under J. F. Seinsheimer & Company, of Galveston, Texas, the defendant's general agents.

5. During the term of said policy J. B. Sowders,

an adult employee of Elmo Rock Company, accidentally suffered bodily injuries by reason of the prosecution of the work of quarrying and crushing rock at Elmo, Texas, by said Elmo Rock Company, and by himself as its employee. For the recovery of damages for such injuries he sued Elmo Rock Company in the District Court of Kaufman County, Texas. [65]

6. Having been duly notified by Elmo Rock Company of the occurrence of such accident and the institution of such action the defendant undertook to defend the action, and took upon itself the entire management and control thereof to the exclusion of Elmo Rock Company, all in accordance with the provisions of said policy. The defendant conducted its defense of said action through John Davis of the firm of Meador & Davis, attorneys at law at Dallas, whom it habitually employed in litigation in the vicinity of Dallas. The litigation was managed by Davis, as attorney of record for Elmo Rock Company under the empoyment of the defendant herein.

7. On June 19, 1912, J. B. Sowders recovered judgment against Elmo Rock Company for five thousand dollars and costs with interest at six per cent, from the date of the judgment. On July 19, 1912, the motion of Elmo Rock Company for a new trial was overruled. By a law of the State of Texas then in force it was made the duty of the clerk of the court to issue an execution upon said judgment upon the application of the successful party thereto after the expiration of twenty days from the rendition of the judgment, and after the overruling of the motion

for new trial, unless a supersedeas bond on appeal or writ of error should have been theretofore filed and approved. By other laws of the state of Texas then in force Elmo Rock Company was entitled to suspend the execution of said judgment pending its appeal therefrom, by giving a supersedeas appeal bond in a sum at least double the amount of the judgment, interest and costs, conditioned that the appellant should prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals should be against it, it should perform such judgment, sentence or **[66]** decree and pay all such damages as said Court might award against it, and such supersedeas appeal bond might be made by the plaintiff herein as a surety company.

8. On August 7, 1812, a supersedeas appeal bond executed and conditioned as required by the Texas law was filed in said action, the principal in said bond being Elmo Rock Company and the surety the plaintiff herein. Thereby the execution of the judgment in said action was suspended pending the appeal.

9. Correct copies of the policy of employer's liability insurance, the judgment in Sowders v. Elmo Rock Company, the relevant Texas statutes and the supersedeas appeal bond above mentioned are attached to the complaint as exhibits "A," "B," "C," and "E," respectively.

3.

10. Upon the rendition of the judgment in Sowders v. Elmo Rock Company, Davis notified the de-

fendant herein thereof, and was instructed by letter dated June 28, 1912, as follows: "Kindly proceed with the appeal of this case, but you will understand that we do not furnish a supersedeas bond staying execution.

Thereupon Davis requested Elmo Rock Company to furnish a supersedeas appeal bond, but it refused to do so upon the ground that the defendant herein should do this. Davis wrote again urging that the rock company furnish the bond. A copy of this correspondence having been forwarded to the defendant herein, it wrote to Davis July 30, 1912, saying: "We endorse your action taken in this matter and will ask you to proceed with the appeal, but the assured must furnish its own supersedeas bond."

11. W. L. Leeds, managing partner of the defendant's agents Miller-Stemmons Company, called on the president of the plaintiff [67] herein, and the latter consented to make a supersedeas appeal bond in Sowders v. Elmo Rock Company, provided an indemnity bond were given it by the defendant herein. Miller-Stemmons Company procured an indemnity bond from the defendant through the attorneys Meador & Davis. They were authorized by J. F. Seinsheimer & Company to have the bond executed.

4.

12. Davis called on the president of the plaintiff company, and obtained from it the supersedeas appeal bond above mentioned, and as an inducement to the issuance thereof gave to it an indemnity contract reading as follows:

"The State of Texas,
County of Dallas.

Whereas, heretofore, to wit, on the —— day of ————, the Pacific Coast Casualty Company of San Francisco, California,. issued to the Elmo Rock Company of Terrell, Texas, as employer's liability policy, insuring said rock company against loss and expense arising from claims upon the assured for damages on account of bodily injuries suffered or alleged to have been suffered during the period of said policy by any employee of the assured by reason of the prosecution of the work described in said policy; and,

Whereas, during the period of said policy, one of the employees of said assured, to wit, J. B. Sowders, was injured by reason of the prosecution of the work described in said policy; and, whereas the said J. B. Sowders brought suit against said rock company and recovered a judgment of $5,000.00 in the District Court of Kaufman County, Texas; and, whereas the said Pacific Coast Casualty Company believes that said judgment is erroneous and that no liability exists by reason of said injury sustained by said Sowders, and has employed John Davis, an attorney at law, Dallas, Texas, to perfect an appeal from said judgment and prosecute the same to effect; and, whereas a supersedeas bond of $11,000.00 is required to perfect said appeal, and the General Bonding & Casualty Insurance Company of Dallas, Texas, in consideration of this agreement and other considerations, has agreed to execute said supersedeas bond as surety; Now,

Therefore, in consideration of said agreement and other good and valuable considerations, the said Pacific Coast Casualty Company does hereby agree and obligate and bind itself to indemnify, and keep indemnified, the said General Bonding & Casualty Insurance Company against any and all loss, [68] costs, charges, counsel fees, damages and expenses whatever, which said bonding company shall or may sustain, incur or be put to at any time by reason or in consequence of having executed said supersedeas bond as surety.

Witness its hand, this 6th day of August, 1912.

PACIFIC COAST CASUALTY COMPANY.

By JOHN DAVIS,

Its Attorney at Law and in Fact.

13. Stephenson, who acted for the plaintiff company, was not shown the defendant company's letter of June 28, 1912, to its attorneys, and was not in any way made aware of any limitations upon the authority of Davis, and dealt with him in the supposition that his authority was that which was usual in such cases, and was apparently possessed by him.

14. Said Davis and Leeds knew of the transaction with Stephenson and of the giving of the indemnity contract.

4.

15. In due course the judgment of the District Court in Sowders v. Elmo Rock Company was affirmed by the Court of Civil Appeals, a motion for rehearing was overruled, a writ of error was refused by the Supreme Court, and a motion for rehearing of that matter was overruled and a mandate was

issued by the Court of Civil Appeals and filed with the District Court. The mandate was issued August 12, 1913, and filed in the District Court August 18, 1913. Under the Texas law the filing of the mandate was the final step in the litigation, and entitled Sowders to execution on his judgment. A true copy of the mandate is attached as exhibit "G" to the complaint. By the proceedings on appeal judgment was rendered not only against Elmo Rock Company, but against the plaintiff herein as its surety, for the amount of the judgment rendered in the District Court with interest and costs, and it was upon this judgment that under the Texas practice **[69]** execution was to issue from the District Court.

5.

16. On August 19, 1913, a writ of execution upon the judgment as finally rendered on appeal was issued out of the District Court, and on September 5, 1913, the sheriff of Kaufman County, Texas, levied the same upon a large amount of real and personal property of Elmo Rock Company, and advertised the property for sale October 7, 1913, at the courthouse of Kaufman County. Thereupon a stockholder of Elmo Rock Company obtained the appointment of a receiver for said company by the District Court of Kaufman County, Texas, and the sheriff turned over the property levied upon to the receiver of the company under orders of the District Court, and made return of his execution as unsatisfied without having sold the property. Thereupon an alias writ was issued out of the District Court of

Kaufman County, commanding the sheriff of Dallas County to make the amount of the judgment and interest and costs out of the property of the plaintiff herein.

17. Thereupon on October 22, 1913, under compulsion of the judgment rendered against it upon its supersedeas appeal bond, and at the special request of the receiver of Elmo Rock Company, the plaintiff herein paid to the owners of the judgment in Sowders v. Elmo Rock Company, the amount of the principal and interest due upon said judgment and paid to the officers of court the amount of costs accrued. The principal sum of the judgment was five thousand dollars, and accrued interest was four hundred dollars fifty cents, and the costs were one hundred sixty dollars forty cents. The aggregate sum paid by the plaintiff herein to discharge the judgment in Sowders v. Elmo Rock Company therefore **[70]** was five thousand five hundred sixty dollars ninety cents.

18. In consideration of its payment of the judgment in Sowders v. Elmo Rock Company the owners thereof assigned the same with all rights existing thereunder to the plaintiff, and the receiver of Elmo Rock Company under order of the District Court assigned to the plaintiff the employer's liability policy issued by the defendant.

19. The property of Elmo Rock Company levied upon by the sheriff and held by the receiver of 19 acres of land worth nineteen thousand dollars, and encumbered by a lien of three thousand five hundred dollars prior to the execution lien, and personal

property not including the employer's liability policy here in suit.

6.

20. On November 28, 1913, the plaintiff herein demanded from the defendant herein the payment of five thousand five hundred sixty dollars ninety cents in full settlement of its obligations under said policy of employer's liability insurance and said contract of indemnity. The defendant refused payment, and denied all liability, and thereupon this action was instituted.

21. The legal rate of interest in Texas applicable to such demands as that sued upon is six per cent.

Conclusions of Law.

As a conclusion of law from the foregoing facts the Court finds that the plaintiff is entitled to have and recover judgment against the defendant for the sum of six thousand, one hundred and sixty and 43/100 dollars ($6,160.43), and costs of **[71]** suit. Let judgment be entered accordingly.

WM. C. VAN FLEET,
United States District Judge.

O. K.—JAMES WALTER SCOTT.
R. S. GRAY.

[Endorsed]: Filed Sept. 15, 1915. Walter B. Maling, Clerk. **[72]**

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,723.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

Judgment on Findings.

This cause having come on regularly for trial on the 11th day of September, 1914, before the Court sitting without a jury, a trial by jury having been specially waived by stipulation filed herein: R. S. Gray and Maurice E. Locke, Esqrs., appearing as attorneys for plaintiff and James Walter Scott, Esq., appearing as attorney for defendant; and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause having been submitted to the Court for consideration and decision, and the Court after due deliberation having filed its special findings in writing, and ordered that judgment be entered herein in accordance therewith;

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that General Bonding and Casualty Insurance Company, a corporation, plantiff do have and recover of and from Pacific Coast Casualty Company,

a corporation, defendant, the sum of Six thousand one hundred sixty and 43/100 ($6,160.43) Dollars, together with its costs herein expended taxed at $90.00.

Judgment entered September 15, 1915.

WALTER B. MALING,
Clerk.

A True Copy. Attest:
[Seal] WALTER B. MALING,
Clerk. **[73]**

[Endorsed]: Filed Sept. 15, 1915. Walter B. Maling, Clerk. **[74]**

In the District Court of the United States, for the Northern District of California.

No. 15,723.

GENERAL BONDING & CASUALTY INSURANCE CO.

vs.

PACIFIC COAST CASUALTY COMPANY,

Certificate of Clerk U. S. District Court to Judgment-roll.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 15th day of September, 1915.

[Seal] W. B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed September 15th, 1915. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[75]**

In the District Court of the United States, Northern District of California, Second Division.

No. 15,723.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,
Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,
Defendant.

R. S. GRAY and LOCKE & LOCKE, for Plaintiff.

MYRICK & DEERING and HAMILTON A. BAUER, for Defendant.

Memorandum Decision Upon Amended Demurrer to Complaint.

DIETRICH, District Judge:

The amended demurrer is overruled in all respects, excepting in so far as it raises the objection of alternative or conditional averments on page five of the complaint, touching the authority of one John

Davis to bind the defendant, or perhaps more broadly touching the validity of the indemnity agreement executed by Davis for and on behalf of the defendant. Amendment in this respect may be made if the plaintiff so desires by interlineation or by filing an amendment, rather than by filing a complete amended complaint. Five days leave will be given for making the amendment.

[Endorsed]: Filed February 18, 1914. Walter B. Maling, Clerk. **[76]**

In the District Court of the United States, Northern District of California, Second Division.

No. 15,723.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

Memorandum Opinion.

LOCKE & LOCKE, of Dallas, Texas, and R. S. GRAY, of San Francisco, for Plaintiff.

MYRICK & DEERING, of San Francisco, for Defendant.

VAN FLEET, District Judge:

A further examination of the grounds advanced by defendant in support of its motion for nonsuit, upon which it rested its case, confirms the impression

made at the trial that they are without substantial merit.

(1) As to the question of the authority of defendant's attorney Davis to bind it by his indemnity agreement to plaintiff, I think, in the first place, as contended by plaintiff, that when defendant authorized Davis to take an appeal he was empowered to do all that was necessary to make that appeal effective, notwithstanding the limitation suggested in defendant's letter that the Elmo Rock Company should furnish the supersedeas bond; and the plaintiff, when applied to by Davis and the defendant's agent Leeds to furnish such bond had a right to assume their authority to represent defendant. Moreover, I think the facts fully sustain the claim that defendant, by paying the premium on the bond and accepting its benefit for the purpose for which it was issued, ratified the acts of its agents in the premises and cannot now [77] be heard to question them.

(2) There is nothing of substance in the claim that the policy sued on is not assignable. It is more than a policy of indemnity. It is one of insurance against loss, and when the liability of the defendant became fixed by a loss suffered, any reason for holding the policy nonassignable ceased and it was competent for the assured to assign to plaintiff, in consideration of the latter paying the judgment against it, the rights of the assured thereunder. In this respect the case is within the principles of Maryland Casualty Company vs. Omaha Electric Light & Power Company, 157 Fed. 514.

(3) The other grounds urged do not require special or separate notice; they are purely technical and not of substantive value.

The recovery should be for the amount paid in satisfaction of the judgment recovered by Sowders, including the interest and costs. The defendant's contract was to indemnify the insured for the principal amount and all costs and expenses of defending the action. The interest accruing on the judgment was a part of such expenses and was incurred through the delay arising from defendant's prosecuting the appeal. It could have been saved by payment of the judgment, and must therefore be regarded as incurred by defendant and for its protection. In my view it falls within the terms of the policy, which expressly covers costs and expenses in addition to the indemnity.

Plaintiff will have judgment accordingly.

[Endorsed]: Filed March 15, 1915. Walter B. Maling, Clerk. [78]

In the District Court of the United States, for the Northern District of California, Second Division.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

Defendant's Bill of Exceptions.

Now comes the defendant herein, Pacific Coast Casualty Company, a corporation, Messrs. Myrick & Deering and James Walter Scott, Esq., appearing as its attorneys, and presents this, its bill of exceptions, as follows:

This cause came on to be heard on the 12th day of September, 1914, before the Honorable William C. Van Fleet, Judge of the United States District Court for the Northern District of California, sitting at San Francisco, California, without a jury, a jury having been waived in writing by both parties, the plaintiff appearing by R. S. Gray, Esq., and Maurice E. Locke, Esq., its attorneys, and the defendant appearing by James Walter Scott, Esq., of counsel for defendant, All parties having announced themselves ready for trial the [79*—1†] following proceedings were had and testimony given:

"Mr. SCOTT.—The defendant, if your Honor please, before the taking of the evidence begins, desires to move that the plaintiff be directed to elect between the three separate causes of action which, to our mind, are set up in the complaint, and to now state whether they are suing as assignee of the Elmo Rock Company by virtue of the assignment said to have been received by the receiver in a certain action in Texas, or whether they are proceeding on the theory that they, as surety, are subrogated to certain rights of the Elmo Rock Company. All three mat-

*Page-number appearing at foot of page of original certified Record.
†Original page-number of Defendant's Bill of Exceptions as same appears in Original Certified Transcript of Record.

ters are set forth in the complaint. We demurred.

"The COURT.—The demurrer was overruled, was it not?

"Mr. SCOTT.—Yes; we demurred on these same grounds.

"The COURT.—Your motion will be denied.

"Mr. SCOTT.—We wish to make the motion in aid of the demurrer so as to exercise our point, and we take an exception.

"The COURT.—Very well."

DEFENDANT'S EXCEPTION NO. 1.

[Deposition of Angus G. Wynne, for Plaintiff.]

Thereupon Mr. Locke introduced in evidence and read the deposition of [80—2] ANGUS G. WYNNE, a witness called for the plaintiff, who testified as follows:

Direct Examination.

(By MAURICE E. LOCKE, Esq.)

The WITNESS.—My name is Angus G. Wynne; residence, Kaufman, Texas. I am a member of the firm of Wynne & Wynne, of Kaufman, Texas. That firm was engaged in the practice of law in 1911 and 1912 in Kaufman County, Texas. Their office was at Wills Point, Van Zandt County. It now maintains an office in each of the above-named places. In the case of J. B. Sowders vs. Elmo Rock Company, pending in the District Court of Kaufman County, and numbered 5774 on the docket of that court, we represented the plaintiff as his attorneys. That case was finally tried upon the first amended original petition of the plaintiff, filed June 5th, 1912, and

(Deposition of Angus G. Wynne.)

upon the first amended original answer of the defendant, Elmo Rock Company, filed June 5th, 1912. Meador & Davis, attorneys, were in active control of the litigation in behalf of the defendant Elmo Rock Company. Of that firm John Davis had direct charge of the litigation. My correspondence and negotiations regarding [81—3] the matters incidental to the progress of the litigation were had with John Davis. All letters that were received were either signed by John Davis, or Meador & Davis per John Davis, unless some letter was merely signed Meador & Davis. I don't remember whether John Davis was on every letter or not. The case was tried in the District Court of Kaufman County, and the plaintiff recovered a judgment against the defendant in the sum of Five Thousand Dollars, and it was appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District at Dallas, and was there affirmed by said Court, the defendant applying to the Supreme Court of the State of Texas, or made application for a writ of error, which application was refused by the Supreme Court and the judgment of the lower courts affirmed.

"Q. What steps did you take after filing of the mandate for the collection of the judgment?

"Mr. SCOTT.—We object to that as calling for secondary evidence and not the best evidence.

"The COURT.—The objection is overruled."

DEFENDANT'S EXCEPTION NO. 2.

"A. I applied to the firm of Meador & Davis, at

(Deposition of Angus G. Wynne.)

Dallas, Texas, in person and by letter. They stated to me that their client would pay the money and it would come forward in a few days.

"Mr. SCOTT.—We move that the latter portion of the answer go out as hearsay.

"The COURT.—The motion is denied."

DEFENDANT'S EXCEPTION NO. 3.

"Mr. YOUNG. (Of counsel for the defendant on the taking of the original deposition.) I object to that, and ask for the production of the letter. Have you got the letter? [82—4]

"A. I have got some of them. I don't remember the date of the personal application to Mr. Davis at his office at Dallas, but I wrote to them on July 11th, 1913.

"Q. Will you read your letter into the record?

"Mr. SCOTT.—We object to that as immaterial, irrelevant and incompetent.

"The COURT.—The objection is overruled."

DFENDANT'S EXCEPTION NO. 4.

"A. It is as follows: 'Kaufman, Texas, July 11th 1913, Meador & Davis, Dallas, Texas. Dear Sirs: In re: Sowders vs. Elmo Rock Company. Our client is becoming very impatient about his money in the above case, and is punching us all the time. If you will rush the matter up we will appreciate it. Very truly, Wynne & Wynne, by Angus G. Wynne.' To which John Davis replied on the bottom of the same sheet of paper: 'Mr. Wynne: We are again to-day writing to our people to let the money come forward on this. What has become of the Elmo Rock Com-

(Deposition of Angus G. Wynne.)

pany business and property? Yours very truly, Meador & Davis, by John Davis.' I again took the matter up with Mr. Davis, I believe it was by telephone, and also called at his office, but as I remember now, did not get to see Mr. Davis personally, but I wrote to him at a later date and urged him to forward this money, to which he replied on July 21st, 1913.

"Q. Read that letter into the record.

"Mr. SCOTT.—We object to that on the ground that no proper foundation is shown. Mr. Davis is shown to be the attorney for the Elmo Rock Company. There is no proof that he is our attorney, or that he is authorized to bind us.

"The COURT.—So far as that is concerned, they may not be able to prove all the facts by one witness, but it is not at all [83—5] incompetent if they show that Davis was representing, in fact, the defendant here, rather than the nominal defendant in that action. If they fail to show that, then, of course, you can renew your objection. The objection is overruled."

DEFENDANT'S EXCEPTION NO. 5.

"A. It says: 'Dallas, Texas, July 21st, 1913. Messrs. Wynne & Wynne, Wills Point, Texas. Dear Sirs: Referring to the case of Sowders vs. Elmo Rock Company, beg to advise that we have just received a letter from the Pacific Coast Casualty Company, in which they say you must collect your judgment out of the Elmo Rock Company and that then they will

(Deposition of Angus G. Wynne.)

deal with the Elmo Rock Company. We would suggest that you had better obtain execution, if necessary, at once and proceed with the matter, as our client has flatly refused to make payment of this judgment at this time. We are advising Messrs. Dashiell, Crumbaugh & Coon of this condition. Very truly yours, Meador & Davis, by John Davis.' There was some other correspondence that I have not now in my file, but I had execution issued by the District Clerk of Kaufman County, and placed the same in the hands of W. R. Crane, Sheriff of Kaufman County, who levied upon certain property of the Elmo Rock Company—After this return—in the meantime, I had taken the matter up with the General Bonding & Casualty Insurance Company and they had asked me to proceed against the Rock Company and I had alias execution issued and caused the same to be issued on the 9th day of October, 1913, against the Elmo Rock Company and the General Bonding & Casualty Insurance Company.

"Q. To what county?

"A. To Dallas County. That execution I presented in person to the General Bonding & Casualty Insurance Company, and [84—6] they paid to Mr. Sowders and to myself the money, costs and interest called for in said alias execution. Mr. Sowders and ourselves assigned together with the First State Bank at Terrell, I believe, our interest in this judgment to the General Bonding & Casualty Insurance Company.

"Mr. SCOTT.—We move that the latter part of

(Deposition of Angus G. Wynne.)

the answer go out as immaterial, irrelevant and incompetent, and not within the issues of the case.

"The COURT.—Oh, I don't think that does any harm. Proceed."

DEFENDANT'S EXCEPTION NO. 6.

The WITNESS.—(Continuing.) The letters which I have read into the record are in my possession here at this time. I would rather not have them taken from my files if they can be copied in the record. I would not like to destroy my files. I refuse to part with them. I have never returned that original alias execution into court. That never was executed by the sheriff. The money was paid voluntarily. I will let you have that. I do not care about that execution. The assignment of judgment which I have mentioned as having been made by myself and Mr. Sowders and the First State Bank of Terrell, was made in writing. I was present at the time the signatures were placed to the document and can testify to that fact, and, then, I recognize the signatures of all parties to the same, except that of Wade Fleetwood, Cashier of the First State Bank of Terrell, but I witnessed his signature and I know that he did sign it.

The document so referred to by the witness was then and there exhibited to the witness, and, at the request of attorney for plaintiff, then and there endorsed by the notary as follows, "Plaintiff's Exhibit No. 1, May 13th, 1914, C. G. Coffey, N. P., Kaufman County, Texas." [85—7]

(Deposition of Angus G. Wynne.)

"Q. I observe that this assignment recites that the General Bonding & Casualty Insurance Company had paid to the assignors on October 22d, 1913, the sum of $5,402.50, as the principal and interest of the judgment. Please state whether that sum was actually paid in accordance with that recital?

"A. It was."

Cross-examination.

(By Mr. TOWNE YOUNG, of Counsel for Defendant.)

The WITNESS.—(Continuing.) The plaintiff in this original suit was J. B. Sowders. He was injured the 11th day of November, 1911. He was an employee at that time of the Elmo Rock Company. The Elmo Rock Company's property was located at Elmo, Texas, in Kaufman County. The original petition was filed on the 9th day of February, 1912. He had no other attorneys than Wynne & Wynne. The original answer was signed by "Meador & Davis, Attorneys for Defendant." I had correspondence with them prior to the trial of the suit but I have not a copy of all of that. Their letters were not signed at attorneys. They were just signed "Meador & Davis, by John Davis," and did not show who they were attorneys for. I knew who they were representing. They told me, and from my general knowledge of the case and who were the attorneys for the Elmo Rock Company, and who had been in charge of the Elmo Rock Company's business, and I knew from that and from what Mr. Davis informed me as

to who he was representing. I endeavored to keep it out of the case as much as I could as to who he was representing, in order to avoid a reversal of the case in case I got a judgment. John Davis, of the firm of Meador & Davis, at all times actively conducted the negotiations, the trial and the case. My father, the senior member of our firm, tried the case actively. I had prepared the pleadings [86—8] in the case and had developed the case, but was engaged in Court, at Canton, Texas, part of the time when this case was on trial. I caused the issuance of that first execution. That was directly against the Elmo Rock Company and the General Bonding & Casualty Insurance Company, one as principal and the other as surety, I believe. It shows to have been issued on the 19th day of August, 1913. I included the General Bonding & Casualty Company as I make it a custom to include all parties to the supersedeas bond in every execution I issue. They had signed the supersedeas bond. That execution was levied by the sheriff, as his return shows, on certain property of the Elmo Rock Company. It was not made good out of the property as, in the first place, the property was not worth the money, being subject to certain vendors' liens against it. We knew that we could make but little money out of it, if any. It was levied on certain tracts of land, one, two, or three, I have forgotten which, located near the town of Elmo. I remember something about seeing thirty-six and some odd acres of land in several tracts, but the most of this was subject to vendors' lien notes. This prop-

(Deposition of Angus G. Wynne.)

erty was turned over into the hands of the receiver of the Elmo Rock Company under orders of the Court, as shown by the sheriff's return, and I know that such was done myself. I do not know whether that receivership was pending before the execution was levied. I believe that the levy did bring about the receivership. Since I think about it a minute, I believe that that was the fact. I don't remember when the second or alias execution was issued. I think that the alias was issued in October. It shows to have been issued on the 9th day of October, 1913. I intended to have it issued against both of them, and it shows to have been issued against [87—9] the Elmo Rock Company and General Bonding & Casualty Insurance Company. I personally took it to the office of the Bonding Company and was going to have it served, but they paid the money.

"Q. Who paid the money?

"A. I think that the check was signed by the General Bonding & Casualty Insurance Company, and to them I think we transferred the judgment.

"Mr. SCOTT.—I move that the latter portion of the answer be stricken out as immaterial, irrelevant and incompetent, as to the transfer of the judgment.

"The COURT.—It is a part of the cross-examination.

"Mr. SCOTT.—That is true, your Honor, but not brought out in reply to our question 'Who paid the money?'

(Deposition of Angus G. Wynne.)

"The COURT.—The motion is denied."

DEFENDANT'S EXCEPTION NO. 7.

The WITNESS.—(Continuing.) They told me to wait till they consulted their attorneys and tried to get the Pacific Coast Casualty Company to pay it, that they had only gone on the bond at the request of John Davis to protect the Pacific Coast Casualty Company, and that it looked like it wasn't treating them right to make them pay the money, and that they didn't feel like paying it and didn't want to pay it, but they said: "Of course, if we have got to pay it, we don't want to have any execution levied on it, we have got"—I think he said One Hundred Thousand Dollars down here with the Commissioner of Banking & Insurance at Austin, "and we will pay that, if we have to." They had signed the supersedeas bond.

I knew Mr. Davis in this case at attorney for the Pacific Coast Casualty Company, as an attorney at law. I don't know [88—10] whether he was the attorney in fact or not. I just knew from my knowledge of the case who he was representing and who he told me he was representing, just as any man would acquire that knowledge from the trial of the case. I knew that the other attorneys were representing the Elmo Rock Company to the extent that was necessary, and that he was representing the Pacific Coast Casualty Company under their insurance policy, I didn't know how far his authority extended. I only know that he held himself out to me as being the attorney of the Pacific Coast Casualty

(Deposition of Angus G. Wynne.)

Company, and told me that those were the people that he represented, and I did not see the policy and don't know how far it extended.

Redirect Examination.

(By Mr. LOCKE.)

The WITNESS.—(Continuing.) The original execution was issued to Kaufman County and the alias to Dallas County.

[Deposition of C. M. Crumbaugh, for Plaintiff.]

Thereupon there was introduced and read the deposition of C. M. CRUMBAUGH, a witness called for the plaintiff, who testified as follows:

Direct Examination.

(By Mr. LOCKE.)

The WITNESS.—I am C. M. Crumbaugh, and I reside at Terrell, Texas. I am an attorney at law. In 1911 and 1912 I was a partner or member of the firm of Dashiell, Crumbaugh & Coon. We acted as attorneys for the Elmo Rock Company in some matters that they had on hand. I recall the circumstance of the accident happening to one J. B. Sowders, on which a claim was presented by him against the Elmo Rock Company. I was adviser of the Elmo Rock Company during the litigation that **[89—11]** ensued between that company and Sowders and with regard to the rights of the Elmo Rock Company to indemnity from the Pacific Coast Casualty Company. No objection was made at any time by the Pacific Coast Casualty Company to any of the proceedings taken by the Elmo Rock Company

(Deposition of C. M. Crumbaugh.)

in pursuance of the liability policy which it had—any claim of insufficiency upon the part of that company or of a violation of the terms of the policy in any way. Meador & Davis appeared for the Elmo Rock Company in that litigation under employment by the Pacific Coast Casualty Company. The Pacific Coast Casualty Company controlled the litigation in behalf of the defendant.

"Q. Please state whether at any time the Pacific Coast Casualty Company requested Elmo Rock Company to do anything with reference to assisting and co-operating in the progress of that litigation which was not done by Elmo Rock Company?

"Mr. SCOTT.—We object to that on the ground that the proper foundation is not laid, and the matter is not shown to be within the knowledge of the witness.

"The COURT.—The objection is overruled."

DEFENDANT'S EXCEPTION NO. 8.

"A. Nothing that I know of.

The WITNESS. — (Continuing.) The supersedeas bond is signed by Elmo Rock Company by J. B. Whitfield, President, as principal. He was president of that company at that time. He is now dead. The Elmo Rock Company is now in the hands of a receiver. Dashiell, Crumbaugh & Coon, represented Mrs. Whitfield in the receivership proceedings, but I personally conducted the matter. W. D. Fletcher was appointed receiver. He is still acting as such.

"Q. Please state what you know about the pro-

(Deposition of C. M. Crumbaugh.)

ceedings connected **[90—12]** with the payment of this judgment in so far as Elmo Rock Company and its receiver were concerned.

"Mr. SCOTT.—We object to that on the ground that the record is the best evidence.

"The COURT.—The objection is overruled. It would not necessarily be the record."

DEFENDANT'S EXCEPTION NO. 9.

"A. After the judgment was rendered in the District Court, the case was duly appealed and finally a writ of error denied, I believe, by the Supreme Court, and execution was issued by the plaintiff in the case and levied on all of the property of the Elmo Rock Company, covering the land and all the personal property. I did not discover that that execution had been issued until I noticed that it had been posted, and I think the land was to be sold—I think perhaps it was about only two or three days before the land was to be sold when I first discovered that the property had been seized, and in order to keep the assets of the corporation from being used for the purpose of paying off this indebtedness, I applied at once to the District Court for a receivership and had all of the property put in the hands of a receiver and stopped the execution.

"Mr. SCOTT.—We move to strike out the portion of the answer which deals with matters of record, as not the best evidence.

"The COURT.—These are matters that are entirely within the personal knowledge of an attorney; he is not stating the contents of a record at all. He

(Deposition of C. M. Crumbaugh.)

is stating steps that were taken. Motion denied."

DEFENDANT'S EXCEPTION NO. 10. [91—13]

The WITNESS.—(Continuing.) Well, the next I knew of it, Mr. Locke, the surety on the supersedeas bond had paid the indebtedness off. After the receiver was appointed, the company that was on the supersedeas bond sent Mr. Cosnahan down here and he had a conference with me in regard to the matter, and he stated that the company desired to take an assignment from the receiver of any—let me see, now, let's get that thing straight—to take a transfer from the receiver of any rights that it might have under that policy that had been written by the Pacific Coast Casualty Company in behalf of the Elmo Rock Company. I objected to assigning or transferring that matter, unless the surety company that was on the supersedeas bond would exempt the Elmo Rock Company from any further liability at all in the matter. I believe we had some correspondence along that line, but finally we agreed to sign the instrument which you prepared and sent down here, and it was signed after an order had been obtained from the District Court authorizing the receiver to sign it. That assignment was in writing.

The document so referred to by the witness was then and there exhibited to the witness and, at the request of attorney for plaintiff, then and there endorsed by the notary as follows, "Plaintiff's Exhibit No. 2, C. G. Coffey, N. P., Kaufman County, Texas, May 13th, 1914." Said document is marked exhibit

(Deposition of C. M. Crumbaugh.)

"J" attached to plaintiff's complaint herein.

The various recitals contained in that instrument were in accordance with the facts. I believe the property levied upon by the sheriff and by him turned over to the receiver is still held in the receivership pending the results of the effort of General Bonding & Casualty Insurance Company to collect its disbursement from the Pacific Coast Casualty Company. I believe it all is, except an undivided interest in sixty-six and two-thirds [92—14] acres of land which has been sold under order of the court for the purpose of paying off a vendor's lien that was held against the interest of the Elmo Rock Company by Mrs. E. F. Bray, of Dallas. That is a lien that underlay the lien of this execution. If anything else has been sold, I don't know it.

Cross-examination.

(By Mr. TOWNE YOUNG.)

The WITNESS.—(Continuing.) I was present at the trial as representative of the Elmo Rock Company. The plaintiff sued for twenty-five thousand dollars general damages, and nine hundred dollars special damages, and two hundred and fifty dollars for physician and surgeon. It was about twenty-six thousand, one hundred and fifty dollars, I believe, all together. I believe I did take active part in the trial. I believe I made an argument. I think I opened the argument. Mr. Davis controlled the trial of the case. I examined no witnesses and took no active part in the case except when it had gone to the jury. I opened the argument for him. My

(Deposition of C. M. Crumbaugh.)

recollection is that we commenced one day and closed the next, but I would not be positive. It might possibly have taken part of three days. No one on behalf of the Pacific Coast Casualty Company asked me to assist in the defense save in a general way. Mr. Davis said he would be glad to have us with him in the case. Mr. Whitfield did this: When the suit was filed down there, he came to us and said that he would like to have his interests as fully protected as possible, and while the Pacific Coast Casualty Company under the terms of their policy had reserved the right to employ their own attorneys and that he could not control that matter, still he felt like he would rather pay a fee and have [93—15] some one down there to look after the case for him, that is, other attorneys, and that is the way we came to be in the case. He paid us a fee for going down there and being present at the trial and assisting in picking the jury and things like that. I can't say that I anticipated a larger judgment than was obtained in the case. I think Mr. Sowders claimed to have been bruised and hurt all over, on his shoulders and body and various parts of his anatomy and particularly, however, one of his legs had been badly damaged, and I think broken, and he claimed that one leg was shorter than the other. He claimed a permanent injury. At the time of the trial he was limping around and had a brace of some kind on his leg, and was supposed to be in pretty bad shape. The Elmo Rock Company never did pay anything under the judgment. The assignment of whatever interest the Elmo Rock Company had in this lia-

(Deposition of C. M. Crumbaugh.)

bility policy was brought to me by Mr. Cosnahan, who was connected with Locke & Locke, as I understand it. I read it very carefully. I did not sign it. I had Mr. Fletcher sign it. He signed it upon my advice. No efforts were made to collect this judgment from the Elmo Rock Company, more than the executions that were issued in the case, as far as I know.

Redirect Examination.

(By Mr. LOCKE.)

"Q. In the conference that took place in the court between yourself and Mr. Cosnahan and Judge Hawkins, it was requested and understood by all the parties that the surety company was to pay this judgment in behalf of the Elmo Rock Company, because it was surety on the supersedeas bond, and that it desired the transfer of the policy in consideration of such payment? **[94—16]**

"Mr. SCOTT.—We object to that on the ground that it is not redirect examination, and further, that it is immaterial, irrelevant and incompetent; and more particularly, if your Honor please, upon this ground, that the assignment of this policy we claim cannot be the basis of an action against this defendant for the reason that the policy has never been performed—by the terms of the policy requiring payment by the assured—was never performed prior to the assignment, that the assignee has never acted under the policy, that the assignee of the policy made its payment a considerable time before the policy was assigned to it, and in making the pay-

(Deposition of C. M. Crumbaugh.)

ment was—so far as this defendant is concerned—purely a volunteer. We therefore object to that evidence.

"The COURT.—The objection is overruled."

DEFENDANT'S EXCEPTION NO. 11.

"A. Yes, sir, that was the understanding.

"Q. And the surety company did finally pay the judgment in behalf of the rock company, and because it was surety on the bond?

"Mr. SCOTT.—The same objection.

"The COURT.—The same ruling."

DEFENDANT'S EXCEPTION NO. 12.

"A. That is my understanding and information about it."

Recross-examination.

(By Mr. YOUNG.)

The WITNESS.—(Continuing.) I applied for the receivership about the 16th of September, 1913. I would not know anything about the reasonable value of the personal property at the time of the levy as shown by the sheriff's return. I possibly could give you some approximate idea of the value of the **[95—17]** land. There were several tracts of land levied on, as well as a list here of personal property. I don't know anything about that personal property. I should say from my knowledge of land values, regarding as an agricultural proposition and not putting a value on it with reference as to what it might be worth as a stone quarry, that that land was worth approximately forty dollars an

(Deposition of C. M. Crumbaugh.)

acre. That is not with reference to its use by the Elmo Rock Company. Its value as a rock quarry would be purely speculative; at least, we so found it that way, and I have not the slightest idea what it would be worth. I believe the rock company was chartered in 1910. I believe that is when the charter was gotten from the State. I know I had something to do with preparing the matter, and I believe that it was in 1910 that the company was organized and chartered. I do not know anything about the value of the improvements. I am not familiar with those things and could not say. I was connected with the company in a legal way from the time of the incorporation. Well, let me see. I believe that I had something to do with the legal affairs of the Elmo Rock Company before we formed the partnership here of Mr. Dashiell, Mr. Coon and myself. That was some three years ago, or possibly a little more. It may have been in 1910, or possibly it may have been in 1909, I don't know, I don't remember. Off and on, I have had something to do with the Elmo Rock Company down there from the beginning, you might say, and even before it was organized as a corporation. Mr. Whitfield owned the land down there and he had been projecting around with the rock quarry for a long time, and finally organized a corporation, and in a general way I advised them in regard to the business matters of the concern in several instances, but I cannot recall them to mind now and tell you **[96—18]** specifically what they were.

[Deposition of W. D. Fletcher, for Plaintiff.]

Thereupon there was read and introduced in evidence the deposition of W. D. FLETCHER, a witness called for the plaintiff, who testified as follows:

Direct Examination.

(By Mr. MAURUCE E. LOCKE.)

The WITNESS.—I am W. D. Fletcher, and reside at Terrell, Texas. I am the same W. D. Fletcher who was appointed by the District Court of Kaufman County to be the receiver of Elmo Rock Company. I took possession of the property of that Company. It included that upon which the sheriff of Kaufman County had levied. He turned that property over to me, and I am still holding it in my possession. I sold one piece of property by order of court for the satisfaction of a vendor's lien. To the best of my knowledge the sheriff levied on two or three tracts of land and on a lot of machinery. That property constituted the stone quarry complete and ready for operation. It would be a hard question to answer what was the value at the time I took possession of the property, of the land and machinery and the whole plant, inasmuch as it was rock land there and there was machinery etc., but I think it would represent about something like four or five thousand dollars for the machinery. That is an estimate, however. I guess the value of the land considered as land available for stone quarry purposes was something like a thousand dollars an acre. Elmo Rock Company owned thirteen acres in one tract, and six in another and an undivided one-half

(Deposition of W. D. Fletcher.)

interest in sixty-six and two-third acres. It was all stone land. Aside from the fact that [97—19] the undivided half interest has been sold for the purpose of satisfying a prior lien, all of the remaining property is still in my hands and my administration is held up awaiting the result of this suit. I signed the assignment of this policy under order of court.

The document so referred to by the witness was then and there exhibited to the witness and identified by him as such document and the witness then and there identified his signature to said document, said document being the one so heretofore endorsed for identification by the notary as "Plaintiff's Exhibit No. 2." Said document is marked exhibit "J," attached to plaintiff's complaint herein.

Cross-examination.

(By Mr. TOWNE YOUNG.)

The WITNESS.—I was appointed receiver of the Elmo Rock Company about the 17th of September, 1913. I had information about the appointment before I was appointed receiver. Judge Crumbaugh came to me and told me that they had levied on the stuff down there and that the only way to get over it was to go into the hands of a receiver, and I told him to go ahead. That was the purpose of the receivership. I had nothing to do with that business. I am in the saddlery and harness and implement business at Terrell. I know nothing about the rock business, only what I have learned since I have been connected with that. I have done nothing only to leave it standing there. It was operated about

(Deposition of W. D. Fletcher.)

two weeks after Mr. Whitfield died and then after that it fell through. It never did much business. It only delivered about one hundred cars of rock all told while it was operating. It had been in operation about six or seven months. I had fifteen hundred dollars, fifteen shares of stock in 1912, prior to the receivership. I still have it. The capital stock of [98–20] the company was ten thousand, five hundred dollars. The other debts against the Elmo Rock Company are numerous. They aggregate about nine or ten thousand dollars. I couldn't really tell hardly. If the company was operated and produced rock to the full extent of its capacity down there, it could easily handle its debts in the course of time. It would take new equipment down there to do that. I have never tried to operate it in any way. There was no order of court about operating the concern. I have not made any reports to the Court of what I have done as receiver, only I reported what was down there to him. I have taken no care of these properties or control. Everything is going to the bad there now. Mrs. Whitfield owns the principal interest in the company. This receivership will last twelve months, I presume. I just trust to the lawyers to tell me those things, just to tell me how long it will last and to let them direct me in it. I could not say whether it will last so long as this judgment is outstanding. The purpose of the receivership was to escape any judgment lien.

(Deposition of W. D. Fletcher.)

Redirect Examination.

(By Mr. MAURICE E. LOCKE.)

The WITNESS.—There are all told possibly ten thousand dollars of debts against the company. The lien debts are only on the land. All the liens on the land are prior to this. The land is encumbered about thirty-five hundred dollars, I presume, in liens, and this execution is the only other lien debt.

Recross-examination.

(By Mr. TOWNE YOUNG.)

The WITNESS.—There has been no attempt at foreclosure on behalf of the other lien creditors only on this half interest in this sixty-six acres. I do not know whether all the capital stock has been paid in or not, but that is my understanding. I paid in [99—21] my capital stock in full.

[Deposition of J. B. Sowders, for Plaintiff.]

Thereupon there was read and introduced in evidence the deposition of J. B. SOWDERS, a witness called on behalf of the plaintiff, who testified as follows:

Direct Examination.

(By Mr. MAURICE E. LOCKE.)

The WITNESS.—My name is J. B. Sowders. I live at Terrell. I was in the employ of the Elmo Rock Company in 1911 or 1912. I have done forgot what year it was. I got hurt in an accident out there in 1911, and I was in the employ of the company at that time. I was operating the machine on the cable. The north derrick fell and left the line machine and all fell with it. I fell and the machine fell too. A

(Deposition of J. B. Sowders.)

fellow by the name of Casgrain was with me, the manager of the company. We all fell down together. It crushed my hip and jaw. I sued the Elmo Rock Company. I tried to get them to pay without it and they wouldn't do it. I tried to get them to help me without it. While I was laid up, they would not come to see me or talk to me or anything, and I just hired a lawyer and sued them. I am the same J. B. Sowders that sued the Elmo Rock Company in the District Court of Kaufman County and got a judgment against it. I got my money. I don't know who paid it. They came and handed it to me. That is all I know. I think the Casualty Company is the one that paid it. (A paper is shown to the witness.)

"Q. That is the assignment of the judgment that you executed, is it?

"Mr. SCOTT.—We make the same objection to that, your [100—22] Honor, except in so far as it is introduced in the nature of a receipt to show a payment of the General Bonding Company.

"The COURT.—This is simply proving the genuineness of the signature.

"Mr. SCOTT.—If it is simply a matter of the authentication of it, I have no objection at this stage.

"Mr. LOCKE.—It is simply a matter of the verification of it.

"Mr. SCOTT.—Very well.

"A. That is my signature; I guess that is it."

The document so referred to by the witness was then and there exhibited to the witness, said document being the one so heretofore endorsed for identi-

(Deposition of J. B. Sowders.)

fication by the notary as "Plaintiff's Exhibit 1," and upon such document being so exhibited to the witness he stated that the name J. B. Sowders appearing on page 5 of that document was his genuine signature.

WITNESS.—(Continuing.) I had assigned an interest in that judgment to the First State Bank of Terrell, and Wynne & Wynne had an interest as my attorneys for their fee, so all three of us joined in signing that assignment.

Cross-examination.

(By Mr. TOWNE YOUNG.)

The WITNESS.—I do not know whether I have ever read over the assignment or not. They just brought it around and asked me to sign up to get my money and I signed it. I signed it before I got my money. Half was paid to me. Wynne & Wynne got the other half. The First State Bank had an interest for some money I had borrowed and made it a lien against everything I had until I got the judgment, so I could settle with them. [101—23]

[Deposition of William L. Leeds, for Plaintiff.]

Thereupon there was read and introduced in evidence the deposition of WILLIAM L. LEEDS, a witness called on behalf of the plaintiff, who testified as follows:

Direct Examination.

(By Mr. MAURICE E. LOCKE.)

The WITNESS.—My name is William L. Leeds. I was manager of Miller-Stemmons Company in 1911, as well as a member of the firm, and I hold the same position to-day. On the 18th of June, 1911, we were

(Deposition of William L. Leeds.)

agents for the Pacific Coast Casualty Company. We represented it through the general agency of J. F. Seinsheimer & Company, of Galveston.

(The original policy sued upon in this case, to wit, Policy No. M. E. 36,696, issued under date of June 16th, 1911, to the Elmo Rock Company, was then and there exhibited to the witness, and he testified further as follows:)

The signature to the original policy sued upon in this case, to wit, Policy No. M. E. 36,696, issued under date of June 16th, 1911, to the Elmo Rock Company, is that of Miller-Stemmons Company. That policy was issued, as all policies which we wrote, for the Pacific Coast Casualty Company—that is, the application was taken by us and sent to J. F. Seinsheimer & Co., at Galveston, General Agents, who in turn wrote the policy and returned it to us, and we ran it through our books and countersigned it and delivered it. We collected the premium on it through a broker, Griffiths & Company, of Terrell, Texas. I recall a claim being made against the Elmo Rock Company by one J. B. Sowders for personal injuries sustained by Sowders. A notice was served upon me by Elmo Rock Company of the occurrence of this accident, and we in [102—24] turn, as per our custom, sent the notice to J. F. Seinsheimer & Company, at Galveston, and they in turn either referred the matter to Meador & Davis, Attorneys for the Pacific Coast Casualty Company, or authorized us to do so. It was defended by Meador & Davis, Attorneys for the Pacific Coast Casualty Company.

(Deposition of William L. Leeds.)

No question that I recall was made by the Pacific Coast Casualty Company during the progress of litigation of the case of Sowders vs. Elmo Rock Company regarding the sufficiency of the notice, or the due compliance by Elmo Rock Company with all of its obligations under the policy, or regarding the status of the claim of Sowders as a claim for which Pacific Coast Casualty Company was bound to indemnify Elmo Rock Company. I recall the circumstance of a judgment having been rendered against Elmo Rock Company in the Sowders case, and of the taking of an appeal from that judgment.

"Q. What, if anything, within your knowledge, was done with reference to the making of a supersedeas appeal bond in that case?

"A. We had the bond made by the General Bonding & Casualty Company of Dallas after securing an indemnity bond from the Pacific Coast Casualty Company through the attorneys, Meador & Davis.

"Mr. SCOTT.—I move that the latter part of the answer go out, 'after securing an indemnity bond from the Pacific Coast Casualty Company through the Attorneys, Meador & Davis.' Meador & Davis appears to be the name of a firm of attorneys at law who represent the defendant. There is no authority shown.

"The COURT.—That authority can be shown by the acts of the parties.

"Mr. SCOTT.—It has not been shown.

"The COURT.—I say it may be shown by this very method. [103—25] If it appears thereafter that

(Deposition of William L. Leeds.)

no objection was ever taken to what they did in the matter, the jury has the right to infer authority. Objection overruled. . . . Now, Mr. Scott, I see what your suggestion is as to the statement of the witness that they secured the indemnity from the Pacific Coast Casualty Company through Meador & Davis.

"Mr. SCOTT.—Yes, your Honor.

"The COURT.—I would not regard that as proof of authority.

"Mr. LOCKE.—We simply prove that to show the connection of the indemnity bond with the case.

"The COURT.—Yes. Motion denied."

DEFENDANT'S EXCEPTION NO. 13.

The WITNESS.—(Continuing.) We paid the premium for that bond to the General Bonding & Casualty Insurance Company. By "we" I mean Miller-Stemmons Company. The bond was charged to us direct by the General Bonding & Casualty Company. We first charged Griffiths & Company, of Terrell, Texas, with the premium, inasmuch as they were brokers on the liability policy, and we felt as though they were entitled to the brokerage on the bond as well. They afterwards either advised us that they could not collect or failed to collect, whereupon we transferred the premium to Pacific Coast Casualty Company—that is, transferred the charge for the premium to the Pacific Coast Casualty Company's claim account, which was different from the regular monthly account for the business we wrote for them. About this time, although, after the Paci-

(Deposition of William L. Leeds.)

fic Coast Casualty Company withdrew from the State by reinsuring in another company, the claim account was all closed by Miller-Stemmons Company, being reimbursed with drafts, received from the home office direct or [104—26] from J. F. Seinsheimer & Company, at Galveston, with the exception of this one item, which we afterwards transferred back to our general account, which account covered all policies which we wrote for the Pacific Coast Casualty Company, and the item was finally adjusted in this account in our settlement with them—with their general agents, J. F. Seinsheimer & Company. In this way we finally receive reimbursement for the outlay for the premium. That reimbursement came from Pacific Coast Casualty Company, through its general agents, J. F. Seinsheimer & Company, I presume; at least we made settlement with J. F. Seinsheimer & Company. When the bond had to be made, we called on the General Bonding & Casualty Insurance Company, or I did. I talked to Mr. Stephenson, and he consented to make the bond, provided we secured an idemnity bond from the Pacific Coast Casualty Company, and later the bond was executed by the General Bonding & Casualty Insurance Company. We were not at that time issuing indemnity bonds *of* behalf of the Casualty Company. Meador & Davis issued them. Our agency was confined to the matter of accident insurance, liability insurance and so forth. Meador & Davis were the regularly employed legal representatives of the Pacific Coast Casualty Company in Dallas.

(Deposition of William L. Leeds.)

Cross-examination.

(By Mr. TOWNE YOUNG.)

The WITNESS.—I think that Meador & Davis advised us that the bond would have to be made after the case was lost. They explained it was a supersedeas bond. At that time we had a license from the State as agents for the General Bonding & Casualty Insurance Company. However, we only did what was known as a brokerage business. It was quite often the custom to make such bonds as those for the General Bonding & Casualty Insurance Company. Of course we did not sign the bonds ourselves. The [105—27] bonds were always signed by the home office. We simply secured it and sent the application up to the General Bonding Company's office and they forwarded it. These supersedeas bonds then were a part of the business. Of course they were not as common as Fidelity or contract bonds, but they were bonds that we made. But always the principal under the bond had to be strong financially, or put up some collateral or give us some indemnity before they could be made. That is the reason that I called upon the Pacific Coast Casualty Company to give us indemnity, because we were not satisfied with the financial standing of the Elmo Rock Company. We were not acting as agents for the Pacific Coast Casualty Company in getting this bond made, other than we felt that it was to our interest to see that the assured, Elmo Rock Company, was protected, as of course it would have hurt us, or hurt our business, to have had a judgment to go against them direct, without

(Deposition of William L. Leeds.)

using every effort to see that they were protected. We were agents for the Casualty Company, and therefore felt as though it was our duty to see that they were protected in every way until the claim was paid. We, in making this bond, felt as though it was our duty as agents of the Pacific Coast Casualty Company to beat the case, and if not, to carry it to the last resort before anything was finally done with it. Well, we knew that the claim had been made and we knew that the matter had been referred to Meador & Davis to defend the case, and we knew that they had defended the case and that the case had gone against the Elmo Rock Company, and it was either up to the Elmo Rock Company to pay the judgment or the Casualty Company to pay it for them, as per their contract with them, or bond, to be made and fought through the higher courts. We treated this application for this supersedeas bond as part of the Miller-Stemmons business. We handled the case just as though [106—28] it had been any other case where we were not interested otherwise, where we made a commission out of it. We did not take any precautions other than what we would take in any case in order to protect the Bonding Company. We always looked after the interests of the General Bonding & Casualty Insurance Company to see that it was fully protected before we made any bond. We got a commission from this the same as we would in any other case, and we charged the premium to Griffiths & Company, at Terrell, brokers.

"Q. Did you inform the Terrell people, your

(Deposition of William L. Leeds.)

agents, or the Galveston agents, about the action that you had taken in reference to this bond.

"A. I think that we were instructed, or we were authorized by J. F. Seinsheimer & Company, at Galveston, to have the bond made for the Pacific Coast Casualty Company. Of course I am not positive of that, as I would have to refer to the files to see, but my impression now is that we were authorized by J. F. Seinsheimer & Company, of Galveston, to have the bond executed.

"Mr. SCOTT.—That we move to go out as merely the conjecture of the witness, and not the best evidence.

"The COURT.—Motion denied."

DEFENDANT'S EXCEPTION NO. 14.

The WITNESS.—That was prior to the application for an execution of the bond.

Redirect examination.

(By Mr. LOCKE.)

The WITNESS.—We have a letter of agency from the Pacific Coast Casualty Company or a certificate of authority from them, as well as from the State at Austin. [107—29] I will find this certificate and furnish the reporter a copy of it if it can be found.

(It was stipulated that if found the same might be attached to the deposition and marked Plaintiff's Exhibit "B." The same was not so attached to the deposition as returned—)

[Deposition of John B. Stephenson for Plaintiff.]

Thereupon there was introduced and read in evidence the deposition of JOHN B. STEPHENSON, a witness called on behalf of the plaintiff, who testified as follows:

Direct Examination

(By Mr. MAURICE E. LOCKE.)

The WITNESS.—I am John B. Stephenson of Dallas, Texas. I am President of the plaintiff, General Bonding & Casualty Insurance Company. That relationship has continued about two years. I was President of the Company on the 6th day of August, 1912. I was the company's general manager at that time. I remember the occurrence of the execution by my company as surety and Elmo Rock Company as principal of the supersedeas appeal bond given under date of August 6th, 1912, in the case of J. B. Sowders vs. Elmo Rock Company, then pending in the District Court of Kaufman County, Texas. I represented the General Bonding & Casualty Insurance Company in the negotiations for the making of that bond.

"Q. Please state as nearly as you can remember [**108—30**] them, the negotiations that led up to the making of that bond. Give the history of the transaction.

"Mr. SCOTT.—We desire to object on the ground that no proper foundation has been laid relative to the transaction by Mr. Davis in that behalf. My objection may be anticipating the answer.

"The COURT.—Yes, the question is entirely

(Deposition of John B. Stephenson.)

proper. The answer may develop something that you may object to."

DEFENDANT'S EXCEPTION NO. 15.

"A. Mr. Davis, of the firm of Meador & Davis, telephoned us that he would like to have us execute the bond as surety, and he asked me if we would be in the office and discuss the matter with him. On that day, or the next day—perhaps it was the next day,—Davis came over to the office with the form of bond he wanted executed, and stated that there would be no liability to our company, that the case would be taken care of in the event it was affirmed, and under those representations we signed the bond.

"Mr. SCOTT.—We move that the answer go out as immaterial, irrelevant and incompetent, no proper foundation for the introduction of such evidence being laid, it not being shown that Mr. Davis was anything other than representing the Pacific Coast Casnalty Company in the defense of this damage suit, and as such attorney at law I think the rule of law is well settled that he has no authority to bind his client in the matter of entering into an agreement for an appeal bond.

"The COURT.—Motion denied." **[109—31]**

DEFENDANT'S EXCEPTION NO. 16.

The WITNESS.—(Continuing.) We made some investigation relative to the solvency of the principal of that bond, the Elmo Rock Company. My recollection is that we telephoned Mr. W. P. Allen, of Terrell, and asked him what he thought of the Elmo Rock Company's solvency, and he said that he con-

(Deposition of John B. Stephenson.)

sidered the company perfectly solvent, that he knew the president of the company—J. B. Whitfield, and that he thought that they would be good for five or ten thousand dollars. We made some inquiries with reference to the solvency of the Pacific Coast Casualty Company, and possibly looked up Best's report on the company. We also inquired of Miller-Stemmons Company as to what they thought of the Pacific Coast Casualty Company.

"Q. In whose behalf did Davis represent himself to be acting in applying to you for the execution of this supersedeas bond?

"Mr. SCOTT.—We make the same objection to that, your Honor.

"The COURT.—You understand you cannot prove an agency by the declarations of the agent.

"Mr. LOCKE.—Of course not. It is simply one of the circumstances.

"The COURT.—I think that it is admissible as a part of the transaction. I will let it stand."

DEFENDANT'S EXCEPTION NO. 17.

"A. In behalf of the Pacific Coast Casualty Company. [110—32]

"Q. Are you familiar with the usages and practices at Dallas, and in the State of Texas, with regard to the procurement by attorneys at law of the execution by surety companies of appeal bonds for their clients?

"A. Yes, sir.

"Q. What is the practice in that regard?

"Mr. SCOTT.—We object to that as immaterial,

(Deposition of John B. Stephenson.)

irrelevant and incompetent, not binding upon the defendant in any manner.

"The COURT.—Let it go in."

DEFENDANT'S EXCEPTION NO. 18.

"A. Such matters are usually taken up by us with the company's attorney. I don't believe I have ever executed one where the company took the matter up with us direct.

"Q. Please state whether the usage you have described as obtaining in the office of your own company is within your knowledge the general usage obtaining in the office of other insurance companies in this locality?

"Mr. SCOTT.—Same objections, that it is immaterial, irrelevant and incompetent, not binding upon the defendant in any manner.

"The COURT.—Objection overruled."

DEFENDANT'S EXCEPTION NO. 19.

"A. So far as I have any knowledge, it is.

"Q. Please state what, if any, information you had at the time of executing this appeal bond concerning the extent and nature of the authority of Mr. Davis to represent the [111—33] Pacific Coast Casualty Company in the matter of getting a supersedeas appeal bond.

"Mr. SCOTT.—We object to that as immaterial, irrelevant and incompetent.

"The COURT.—Let it go in."

DEFENDANT'S EXCEPTION NO. 20.

"A. We understood he had full authority to act for the Pacific Coast Casualty Company in the mat-

(Deposition of John B. Stephenson.)

ter of procuring a surety on the proposed appeal bond.

"Mr. SCOTT.—We move that that go out as not responsive to the question. It does not state the information, it simply states his conclusion.

"The COURT.—I will hear the balance of it and see what it shows."

DEFENDANT'S EXCEPTION NO. 21.

"Q. Did Mr. Davis explain to you any limitations upon his authority?

"A. No, sir, he did not.

"Q. Was the matter of his authority discussed between you?

"Mr. SCOTT.—Objected to as immaterial, irrelevant and incompetent, and no foundation laid.

"The COURT.—The objection is overruled. If it should appear that thereafter the case took a course where the defendant here was bound to know, or it was called to its attention that such a contract had been executed on its behalf by Attorney Davis and they made no objection, or acted upon it as though he [112—34] was authorized, that would be, in law, a ratification, and if they did not do anything of the kind, then they cannot be bound by his mere declaration that he acted in certain relations."

DEFENDANT'S EXCEPTION NO. 22.

"A. Our general information was that the Pacific Coast Casualty Company had been represented by Meador & Davis, and that they had power of attorney to execute any paper for them. The exact amount of their power of attorney we did not know,

(Deposition of John B. Stephenson.)

and did not know what their limit was. We supposed they had full authority in this particular case, or in any other case. We had made other bonds for them, and they had never questioned their power of attorney.

"Q. I find among the papers in the case which you turned over to me with other papers at the time the case was placed in my hands, a letter from Pacific Coast Casualty Company to Meador & Davis, under date of June 28th, 1912, signed in the name of Bernard Silverstein, Attorney. The notary will mark this letter Plaintiff's Exhibit 'C' with the date and his name, and attach it to your deposition. Please examine the letter and state when, to the best of your recollection, you first saw and read this letter, and state how, if you know, this letter got into your files, and when it was delivered to you, if you know.

"A. The first time I saw this letter was some months after the bond was executed, when the attorneys for the plaintiff, Wynne & Wynne—the first time I remember seeing that letter was when Wynne & Wynne were making demand upon us for the payment of this judgment. The letter was likely enclosed with the application, which was executed and mailed us after—I don't know just how long—but some time after the [113—35] bond was signed. I have no recollection of having seen that letter until I went to examine the papers after there was some trouble over the payment of this claim. It may have been attached to the application, or enclosed with

(Deposition of John B. Stephenson.)

other correspondence which we received from Meador & Davis in regard to this claim."

The WITNESS.—(Continuing.) We did, as a matter of fact execute the supersedeas bond. As I remember, we were given some kind of indemnity contract. The paper shown to me and marked Plaintiff's Exhibit "D," is the indemnity contract which we received. (Said contract was thereafter offered in evidence as will more particularly hereafter appear from this bill of exceptions.) The company made payment of the judgment. On October 22d, 1913, $5,402.50 was paid. That was the amount of the principal sum of the judgment, together with six per cent interest. On October 25th, 1913, we paid $160.80 court cost, and payment was made to the district clerk of Kaufman County, Texas. No portion of the sum paid by the General Bonding & Casualty Insurance Company to the owners of the judgment, and no portion of the sum paid to the clerk of the court for costs, ever has been repaid to that company for any person.

Cross-examination.

(By Mr. TOWNE YOUNG.)

The WITNESS.—I know nothing about Meador & Davis' connection with the Pacific Coast Casualty Company in this particular case, except what they told us. He said when he approached us for this bond—his first proposition was that he would indemnify us, or the Pacific Coast Casualty Company would indemnify us, to execute the bond. There was

(Deposition of John B. Stephenson.)

very little discussion as to that. He made a formal application for the bond, which was mailed to us some days after the bond was executed, as [114—36] I remember. I am not sure who furnished him the blank application on which to make the formal application. I don't know whether he took a blank from our office, or whether he used a blank of some other company's form. We have been unable to find that application. The bond was executed and this indemnity agreement and application probably was mailed back to us. That was the way we usually did those things, and we made a number of bonds for him. I am absolutely sure he drew that agreement himself. I presume the application and the indemnity bond came in about the same time. I presume the indemnity is made of even date with the bond. It is not a fact that I required Mr. Davis to sign and deliver this indemnity before the bond was delivered to him. Mr. Davis' first proposition, when he first asked us to make the bond, was a proposition on his part that he would indemnify us with the Pacific Coast Casualty Company. My recollection is that he said that he would draw the indemnity bond and would mail it to us, which he did later. He did not in fact then and there give me or execute to me the indemnity bond. Just what time the letter from the Pacific Coast Casualty Company of date June 28th, with respect to the furnishing of a supersedeas bond, came into our office I could not say, but I know that I never saw the letter until I was called upon

(Deposition of John B. Stephenson.)

to pay the judgment, when we went fully through the files to see what papers we had in connection with the matter. Mr. Davis did not inform me as to the contents of that letter. There was no discussion as to the contents of any letter, or as to his power of attorney, or as to what he thought of the case or anything else, except that he would give us indemnity. I think I remember the transaction very clearly: I usually keep those things in my mind pretty well. I could not say just what time that letter came into the office, but I am sure I did not [115—37] see the letter, or any other papers connected with the letter, until we were called upon to pay the bond. Mr. Davis did not expressly tell me that the Pacific Coast Casualty Company had declined to execute, or cause to be executed, a supersedeas bond.

"Q. Is it not a fact that he stated to you that he did not have authority on behalf of the company to execute a supersedeas bond?

"A. I don't think there was any discussion as to his authority. I never heard his authority questioned. I know we did not question it, and we presumed that he did have full authority. We regarded the firm of Meador & Davis as being a very conscientious firm of attorneys, and we did not question his statement when he told us that he would indemnify us by the Pacific Coast Casualty Company. There was no discussion as to his power of attorney at all.

(Deposition of John B. Stephenson.)

"Q. Have you been able to find this application for this bond?

"A. No, sir. I thought the application was with the papers here, but we have no application covering it.

"Q. Have you investigated to see?

"A. Yes, sir.

"Q. Well, what has become of that application?

"A. I cannot say. I cannot say positively that we ever had an application, but my recollection is that Davis agreed to mail back an application and an indemnity agreement.

"Q. It was usual always in those cases to make a formal application?

"A. Yes, sir. It is not our custom to take an application before we execute a bond, if we are dealing with people that we believe are reliable and they state to us that they will [116—38] execute the application and return it to us, we usually execute the bond and get the application later.

"Q. That has been your custom in other cases?

"A. Yes, sir.

"Q. As a matter of fact, it is the most usual and regular thing for the application and bond to be delivered simultaneously?

"A. We most usually have the application before we execute the bond."

[Deposition of John Davis, for Plaintiff.]

Thereupon there was offered and read in evidence the deposition of JOHN DAVIS, a witness pro-

(Deposition of John Davis.)

duced on behalf of the plaintiff, who testified as follows:

Direct Examination.

(By Mr. MAURICE E. LOCKE.)

The WITNESS.—My name is John Davis. I reside in Dallas, Texas. I am an attorney at law and a member of the firm of Meador & Davis. I have been a member of the firm for seven years last past. The firm of Meador & Davis were attorneys for the Pacific Coast Casualty Company during the years 1911 and 1912, in the case of J. B. Sowders vs. Elmo Rock Company. We represented them in other matters as well, but not generally. We just represented them in specific cases that were placed in my hands. They did not, within our knowledge, employ other attorneys at Dallas during the time of our connection with them. They employed us in each specific case in Dallas, and those arising out of the Dallas Agency, within my knowledge, or so far as I know. We defended the case of J. B. Sowders vs. Elmo Rock Company on behalf of the defendant, Elmo Rock Company, [117—39] at the instance of the Pacific Coast Casualty Company. I personally managed the defense of that case. I was in entire control. Dashiell, Crumbaugh & Coon appeared as co-counsel for the defendant. They were the regular attorneys for the Elmo Rock Company, and appeared in a nominal capacity. That was done with my consent. The Pacific Coast Casualty Company was properly and duly notified by the Elmo Rock

(Deposition of John Davis.)

Company of the occurrence of the accident in which J. B. Sowders claims to have been injured. The notice is dated November 17th, 1911. So far as I know it is the primary report. After the receipt of this report the matter was referred to the firm of Meador & Davis for the purpose of investigation and adjustment, and such investigation was made by myself. It resulted in litigation, which I also defended. The Sowders case resulted in a judgment for the plaintiff in the sum of Five thousand Dollars. I then prepared papers looking to an appeal of the case, and advised the Pacific Coast Casualty Company of the result of the trial, and requested that they furnish me a supersedeas bond to perfect the appeal. On June 21st, 1912, I advised the company of the judgment, but I do not see that I made any request for a bond in that letter. The General Bonding Company executed the supersedeas bond upon which the case of Sowders vs. Elmo Rock Company was appealed. The document already marked as Plaintiff's Exhibit "D" (which is set out hereafter), was signed by me and delivered to the General Bonding & Casualty Insurance Company. After carrying the case of Sowders against Elmo Rock Company to the Court of Civil Appeals at Dallas, the judgment of the lower court was affirmed. We then filed an application for a writ of error to the Supreme Court, and that was denied. We moved for a rehearing on the application for a writ of error. The Court refused the motion. The Elmo Rock

(Deposition of John Davis.)

Company prior to the[118—40] final ending of said litigation, did not in any respect fail to co-operate with the Pacific Coast Casualty Company in the defense of the litigation or of the claim, or fail to comply with any request of the Pacific Coast Casualty Company. They performed all obligations and met all requests made by us representing the Pacific Coast Casualty Company, except that they failed and refused to furnish surety on the supersedeas bond. They did not refuse or fail to execute a supersedeas bond themselves as principal.

Cross-examination.

(By Mr. TOWNE YOUNG.)

The WITNESS.—I was employed as attorney at law by the Pacific Coast Casualty Company to represent the Elmo Rock Company in the case of Sowders against the Elmo Rock Company to defend the litigation. That was the extent of my authority; that was what they employed me to do. My observation and experience with this company is that they always required the assured to furnish a supersedeas bond, or furnish surety for the supersedeas bond, but other companies furnish the bonds themselves. I notified Mr. Whitfield as to the practice of this company with reference to giving supersedeas bond. This supersedeas bond was applied for within twenty days. We had to furnish a bond within twenty days after the motion for a rehearing was overruled, but I don't remember the date. I know this, that I wrote the company for the bond, and then they re-

(Deposition of John Davis.)

fused to furnish it and demanded that the assured furnish it, and my time was about expired in which I could file a supersedeas bond and I was up against the proposition of doing the best I could, and my correspondence there shows the condition that I was in and what I did, and whether I did right or not is another question, but I did the best I could under the conditions. **[119—41]**

"Q. What did you state to Mr. Stephenson with reference to the Bonding Company executing this bond?

"A. Well, Mr. Stephenson had before him the letters from the company in reference to the making of this bond. In fact I delivered one letter to him, in which they said that they would not furnish the bond. The letter speaks for itself.

"Q. When did you deliver that letter?

"A. At the time I made application for the bond.

"Q. When was it, with reference to the time the bond was furnished?

"A. Well, perhaps it was the same day.

"Q. I will ask you to state whether the letter you delivered to Mr. Stephenson was not this letter of June 28th, from Bernard Silverstein?

A. My recollection is that I had two or three letters about that. Yes, sir, this is the letter, of June 28th, 1912. I exhibited that to Mr. Stephenson at the time I made application for the bond.

"Q. What did that letter state with reference to the company furnishing a bond?

"A. Well, I can just read what the letter says;

(Deposition of John Davis.)

it says: 'Kindly proceed with the appeal of this case, but you will understand that we do not furnish a supersedeas bond, staying execution.'

"Q. Did you say anything additional to this letter to Mr. Stephenson at that time, touching the Pacific Coast Casualty Company and their connection with the supersedeas bond?

"A. I don't recall that I did, but that letter and the instrument which I executed constituted all that I recall that passed between us on that question.

"Q. Well, is it not a fact that you explained the situation [120—42] fully to Mr. Stephenson in reference to the attitude of the Pacific Coast Casualty Company?

"A. Well, along the lines of this letter, certainly. He had that letter before him.

"Q. Is it not a fact that Mr. Stephenson was then and there informed that you or your firm did not have authority to furnish a bond on behalf of the Pacific Coast Casualty Company?

"A. Well, yes. In other words, I did not undertake to vary the authority given to me in that letter. I delivered the letter to him, because I wanted to act in good faith to him.

"Q. Well, what did Mr. Stephenson say?

"A. He said he would make the bond if I would sign a certain instrument which he prepared and presented to me for execution.

"Q. What did he say with reference to this letter of the Pacific Coast Casualty Company?

"A. I don't recall any conversation along those

(Deposition of John Davis.)

lines. In other words, whatever conversation we had, so far as I now remember, was right along the lines of that letter and of this instrument. I have no independent recollection of it, other than that such an occurrence took place.

"Q. Well, you brought home to him the intent and effect of this letter of June 28th, didn't you?

"A. Well, we had some discussion about it, but the nature of the discussion I don't remember.

"Q. Well, is it not a fact that thereafter the bond was furnished?

"A. Yes, sir, the bond was furnished after all that happened, as I recall, because I wanted to be fair with Mr. Stephenson [121—43] and let him know the conditions under which I was laboring.

"Q. Now this contract of indemnity, of course that was signed by the 'Pacific Coast Casualty Company per John Davis, attorney at law and in fact.' Now, did you sign it in that capacity?

"A. That is my signature and the endorsement made under my name was there at the time I signed it.

"Q. Had you ever represented the Pacific Coast Casualty Company prior to that time in any other capacity than as an attorney at law?

"A. Only in the handling of these several litigated cases that had been referred to us.

"Q. That was in the capacity of attorney at law?

"A. Yes, sir.

"Q. Is it not a fact, Mr. Davis, that Mr. Stephenson, at the time of the execution of the supersedeas

(Deposition of John Davis.)

bond, and prior thereto, was fully advised as to the extent of your authority to represent the company in applying for a supersedeas bond and in making this contract of indemnity?

"A. I will answer that question by saying that all I can swear that Mr. Stephenson knew is what was contained in that letter which I delivered to him.

"Q. Which was delivered prior to the execution of the bond? A. Yes, sir."

Thereupon there was introduced and read in evidence the following:

Plaintiff's Exhibit "C" [Letter, June 28, 1912].

"PACIFIC COAST CASUALTY COMPANY.

[122—44]

"Head Office,
"Merchants' Exchange Building.
"San Francisco, Cal.

"Edmund F. Green, President.
"John C. Coleman, Vice-Pres't.
"Ant. Borel & Co., Treasurer.
"Franklin A. Zane, Secretary.
"Irving C. Morgan, Ass't. Secretary.
"Francis R. Shoemaker, Ass't. Secretary.
"Frank P. Deering, Counsel.

Employers' Liability, Teams, Elevator, Vessels, General Liability, Burglary, Personal Accident, Health, Plate Glass, Automobile, Insurance.

Fidelity & Surety Bonds.

"June 28, 1912.

"Meador & Davis,

"Dallas, Texas.

"Gentlemen:

"*In re:* Sowders vs. Elmo Rock Company.

"We beg to acknowledge receipt of your favor of June 21st and have noted contents of same.

"Kindly proceed with the appeal of this case, but you will understand that we do not furnish a super-

sed*ous* bond staying execution.

"Yours very truly,

"BERNARD SILVERSTEIN,

"Attorney.

BS—G.

[Endorsed]: "Plaintiff's Exhibit 'C.' May 16, 1914. C. J. Evans, Jr., N. P. Dallas Co., Texas."

Plaintiff's Exhibits "E–1" and "E–2" [Letters, May 16, 1912].

"May 16th, 1912.

"Messrs. Meador & Davis,

"Attorneys at Law,

"Dallas, Texas.

"Gentlemen:—

"*In re:* Sowders versus Elmo Rock Company.

"We beg to acknowledge receipt of your favor dated May 4th, in re above, enclosing citation, which we are returning enclosed herein.

"We have instructed you in our wire of May 13th to take charge of this case under a retainer of $75, which covers fees for all services prior to trial, and in the event that the case goes to trial a trial fee of $50 per diem. We have today wired you in this matter as follows:

" 'Sowders matter defend case, but notify defendant we are defending case under a reservation of our rights; send us **[123—45]** copy of letter.'

"We will ask you to carefully note the attitude of the defendant in this matter. By reason of our denying liability in the Casgrain case and the fact that the Elmo Rock Company is trying to bring us

into this case as a party defendant indicates that we are going to have trouble with them in the Sowders case, and that there will probably be collusion between the Elmo Rock Co. and Sowders, as well as between them and Casgrain. If there is any indication at all that the Elmo Rock Company is not carrying our the provisions of their contract and rendering us every aid in the defense of this suit advise us immediately by wire. We want no misunderstanding in this matter, as we will withdraw from the case upon the least indication that the Elmo Rock Company is trying to do us up in this matter or is not carrying out the provisions of its contract.

"Kindly make a complete and thorough investigation of this matter and advise us fully as to our status in both of these cases; the attitude of the Elmo Rock Co. in this matter, as well as giving us your suggestions and opinion with reference thereto, so that we can guide ourselves accordingly.

"Yours very truly,

BS—K. ————————————,

"Attorney.

"Pacific Coast Casualty Company.

"Day Letter.

"May 16th, 1912.

"Meador & Davis,

"Attorneys at Law,

"Dallas, Texas.

"Casgrain matter Griffith not our agent and service on him irregular. Communicate with Seinsheimer Galveston for facts relating to agency. In Sowders

matter defend case but notify defendant we are defending case under a reservation of all of our rights; send us copy of letter.

"PACIFIC COAST CASUALTY CO.

"Chg. A/c Pacific Coast Casualty Co."

Plaintiff's Exhibit "E–3" [Letter June 21, 1912].

"Meador & Davis,

"Attorneys and Counselors at Law,

"Dallas, Texas.

"Dallas, Texas, June 21st, 1912.

"Mr. Bernard Silverstein,

"Attorney,

"San Francisco, Calif.

"Dear Sir:—

In re J. B. Sowders vs. Elmo Rock Co. **[124—46]**

"The writer has just returned from Kaufman, where he has been several days, engaged in the trial of the above-entitled case, resulting in verdict for the plaintiff for $5,000.00. We believe we have developed a good and sufficient defense, under our pleas of contributory negligence and assumed risk, and confidently expect to reverse and render the judgment of the trial courts in the higher courts. We are proceeding with the preparation of record for appeal, and will keep you fully advised.

"There is no question about the fact that the plaintiff was badly injured, but there is no question about the further fact that he knew his work was dangerous; several other employees quit the job because of the danger, and passers-by remarked to the plaintiff and *other* about the dangers incident to the

work in and around the place. The case was tried before a jury, and where a party is hurt or injured to any degree it is almost impossible to get by the jury; but our fights in this county are made in the trial court, for the purpose of getting a good record, and then appeal on the record to the higher courts, with the hope that the case may be reversed and rendered there.

"Very truly yours,

"MEADOR & DAVIS,

"By (Signed) JOHN DAVIS.

"P. S. We have to say that the Elmo Rock Company furnished us all necessary witnesses and aid; they seemed to be anxious and we believe acted in good faith.

"M. & D."

Plaintiff's Exhibit "E–4" [Letter June 28, 1912].

"June 28, 1912.

"Meador & Davis,

"Dallas, Texas.

"Gentlemen:

"*In re:* Sowders vs. Elmo Rock Company.

"We beg to acknowledge receipt of your favor of June 21st and have noted contents of same.

"Kindly proceed with the appeal of this case, but you will understand that we do not furnish a supersed*ous* bond staying execution.

"Yours very truly,

_____,

"Attorney."

"BS—G.

Plaintiff's Exhibit "E–5" [Letter, July 12, 1913].

"Terrell, Texas, 7/12/13.

"Copy.

"Messrs. Meador & Davis, Attys.,

"Dallas, Texas. [125—47]

"Gentlemen:—

"I have your letter of July 11th, enclosing supersed*ious* bond in the sum of $11,000 in the case of Sowders vs. Elmo Rock Company, and note that you ask me to have the bond executed. I have been under the impression that according to the terms of our contract it was the duty of the Pacific Coast Casualty Company to defend this suit in all its branches, and I do not think that I should be called upon to make this appeal bond. At present I must decline to do so, and if you desire any further information you will please confer with Messrs. Dashiell, Crumbaugh & Coon, who are my attorneys.

"Yours very truly,

"(Signed) THE ELMO ROCK CO.,

"By J. B. WHITFIELD, Pres."

Plaintiff's Exhibit "E–6" [Letter, July 13, 1912].

"Dallas, Texas, 7/13/12.

"Copy.

"Mr. J. B. Whitfield,

"Terrell, Texas.

"Dear Sir:—

"We acknowledge receipt of your favor of the 12th inst. wherein you decline to make supersedeas bond

in the Sowders case. Replying beg to say that we are not familiar with the workings of these details, but we have had requests on assureds for supersedeas bonds in all cases we have ever handled, and said bonds have always been furnished without any question. Your protection is the liability policy in your possession.

"Doubtless, as a reconsideration of this matter, you will furnish the bond, and in the meantime we are proceeding with the matter of appeal in the regular manner.

"Let us hear from your promptly.

"Yours very truly,

"(Signed) MEADOR & DAVIS.

"Note.

"Leeds—You will note the attached letter from the Elmo Rock Co., as well as above copy of letter just written to them.

"Very truly,

"(Signed) MEADOR & DAVIS,

"By JOHN DAVIS."

Plaintiff's Exhibit "E–7" [Letter, July 19, 1912].

"PACIFIC COAST CASUALTY COMPANY.

"Galveston, Texas, 7/19/12.

"Pacific Coast Casualty Co.,

"San Francisco, California.

"Gentlemen:—

"*Re:* Policy 36696—Elmo Rock Company.

"We have received from our Dallas Agents copy of letter sent [126—48] by Messrs. Meador &

Davis to the above assured as well as copy of assured's letter to Messrs. Meador & Davis, copies of which we are enclosing herewith for your information.

"Yours very truly,

"J. F. SEINSHEIMER & COMPANY,

"Per ————————,

"General Agents."

"JFS/T.

———

Plaintiff's Exhibit "E–8" [Letter, July 30, 1912].

"July 30, 1912.

"Meador & Davis,

"Dallas, Texas.

"Gentlemen:—

"*In re:* Sowders vs. Elmo Rock Company.

"We are in receipt of copies of letters from Elmo Rock Company to yourself and your reply to them from *from* J. F. Seinsheimer & Co., contents of which have been noted.

"We endorse your action taken in this matter and will ask you to proceed with the appeal, but the assured must furnish *it* own supersed*eous* bond.

"As S*h*einsheimer & Company are not our agents any longer, we will ask you to kindly communicate direct with us in connection with all cases that you are handling in our behalf.

"Yours very truly,

"BS—G. ————————,

"Attorney."

Plaintiff's Exhibit "E–9" [Letter, July 1, 1913].

MEADOR & DAVIS,

"Attorneys and Counselors at Law,

"Dallas, Texas.

"Dallas, Texas, July 1st, 1913.

"Mr. Bernard Silverstein, Attorney,

"San Francisco, Calif.

"Dear Sir:—

"*In re:* Sowders vs. Elmo Rock Company.

"You will recall that the above suit was for something like $26,000 damages; that judgment was rendered in trial court for $5,000.00, and costs. The case was appealed and judgment of the trial court was affirmed by the Court of Civil Appeals; later the Supreme Court refused writ of error, and denied motion for rehearing last week. Execution will be due and issued within the next few days, unless judgment is protected. The Elmo Rock Company, we are informed, is now insolvent, and perhaps in the hands of a receiver,—so that the execution will likely be issued against our Surety on the supersedeas bond, if the judgment is not paid promptly.

"Kindly advise us your wishes in this matter.

"Very truly yours,

"MEADOR & DAVIS,

"By (Signed) JOHN DAVIS." [127—49]

Plaintiff's Exhibit "E–10" [Letter, July 12, 1913].

MEADOR & DAVIS,

"Attorneys and Counselors at Law,

"Dallas, Texas.

"Dallas, Texas, July 12th, 1913.

"Mr. Hamilton A. Bauer, Secretary,

"San Francisco, Calif.

"Dear Sir:—

"*In re:* Sowders vs. Elmo Rock Company.

"We acknowledge receipt of your letter of July 7th, 1913, wherein you say: 'In reference to *Souden* versus Elmo Rock Company, if the concern is insolvent, we will pay nothing.'

"At the time this appeal was prosecuted the Elmo Rock Company was a going concern, and it was necessary to give supersedeas bond in penalty of double the amount of judgment, in order to avoid the issuance of execution. The General Bonding & Casualty Insurance Company of Dallas, Texas, made this bond, and as the Elmo Rock Company is insolvent, it will be up to the Bonding Company to pay the judgment. What is your views and practice about this?

"Very truly yours,

"MEADOR & DAVIS,

"By (Signed) JOHN DAVIS.

"P. S. We hand to you bill of costs, rendered by the Clerk of the Court of Appeals, showing due the appellate courts, in the sum of $27.40.

"M. & D."

Plaintiff's Exhibit "E–11" [Letter Nov. 24, 1913].

"November 24, 1913.

"Mr. John Davis,

"c/o Meador & Davis,

"Dallas, Texas.

"Dear Sir:—

"This morning for the first time there was called to the attention of the Pacific Coast Casualty Company instrument which you signed as attorney in fact, August 6, 1912, purporting to indemnify the General Bonding and Casualty Insurance Company, of Texas, against loss by reason of the execution of a certain supersedeas bond in the matter of J. B. Sowders vs. Elmo Rock Company.

"We regret that you should have presumed to represent the Pacific Coast Casualty Company in any other capacity than that in which you are engaged, an attorney at law defending the said litigation, and in that capacity *unly* under instructions.

"We, therefore, upon receiving knowledge of your action in the premises immediately and at our first opportunity repudiated [128—50] each and every act of yours in the premises appertaining.

"A copy of that certain instrument, which is hereby repudiated as executed by you, without authority of *t*ight from this Company, is annexed to and made a part of this letter.

"Very truly yours,

"PACIFIC COAST CASUALTY COMPANY,

"HAB—H.

"Vice-President.

"Enc."

Plaintiff's Exhibit "E-12" [Letter, Undated].

"MEADOR AND DAVIS,

"Attorneys & Counselors at Law,

"Dallas, Texas.

"Mr. Kirkham Wright,

"Vice-President,

"Pacific Coast Casualty Co.,

"San Francisco, Calif.

"Dear Sir:—

"Your favor of November 24th, 1913, in reference to a certain instrument executed by me on August 6th, 1912, purporting to indemnify the General Bonding & Casualty Insurance Company, received.

"This matter has given me much trouble, and I regret that things are in the present shape. However, it is difficult to always act as one should.

"The facts are, that we were instructed to prosecute the appeal in the Sowders case, but were instructed to call on the Elmo Rock Company, for bond. We did perfect the appeal, except that bond was not made. The Elmo Rock Company did not seem to understand the situation and were haggling over whether they should furnish the bond or not. However, we thought they would finally sign application for the bond; but the time within which we could use the bond was limited, and we went to the General Bonding & Casualty Insurance Company and presented the whole matter to them. This Company was informed that we did not have authority to furnish bond on your behalf; in fact you had written us a letter expressly saying that you would

not furnish the bond,—this letter was delivered to the Bonding Company and has been in their files since on and before the bond in the Sowders case was executed and delivered.

"There are numerous reasons and statements we could give, which would or might justify us in the action taken; but the only thing you are now interested in, is the fact that the Bonding Company was fully advised of the authority we had in the matter, by reason of the letter which you had written to us, and which we delivered to the Bonding Company.

"Very truly yours,

"MEADOR & DAVIS,

"By (Signed) JOHN DAVIS.

"[Endorsed]: Opened and Filed Jul. 11, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk." [129—51]

Thereupon there was introduced and admitted in evidence the policy of insurance sued upon. A copy of said policy of insurance is attached to the complaint on file herein and marked exhibit "A," and was in the words and figures set forth in said exhibit, to which reference is hereby expressly made, and which said exhibit is hereby made a part hereof.

Thereupon plaintiff offered in evidence the contract of indemnity heretofore referred to in said depositions as Plaintiff's Exhibit "D."

"Mr. SCOTT.—We object to the introduction of that paper upon the ground that it affirmatively appears that Mr. Davis did not have authority to sign that as attorney in fact of the Pacific Coast Casualty Company.

"The COURT.—I will let that go in subject to the objection."

Defendant's Exception No. 23.

[Plaintiff's Exhibit "D" (in Bill of Exceptions).]

The said Plaintiff's Exhibit "D" is in words and figures following, to wit:—

"The State of Texas,

"County of Dallas.

"Whereas, heretofore, to wit, on the —— day of ————, the Pacific Coast Casualty Company of San Francisco, California, issued to the Elmo Rock Company of Terrell, Texas, an employer's liability policy, insuring said rock company against loss and expense arising from claims upon the assured for damages on account of bodily injuries suffered or alleged to have been suffered during the period of said policy by any employee of the assured by reason of the prosecution of the work described in said policy; and,

"Whereas, during the period of said policy, one of the employees of said assured, to wit, J. B. Sowders, was injured by reason of the prosecution of the work described in said policy; and, whereas the said J. B. Sowders brought suit against said rock company and recovered a judgment of $5,000.00 in the District Court of Kaufman County, Texas; and, whereas the said Pacific Coast Casualty Company believes that said judgment is erroneous and that no liability exists by reason of said injury sustained by said Sowders, and has employed John Davis, an attorney at law, Dallas, Texas, to perfect an appeal

from said judgment and prosecute the same to effect; and, whereas [130—52] a supersedeas bond of $11,000.00 is required to perfect said appeal, and the General Bonding & Casualty Insurance Company of Dallas, Texas, in consideration of this agreement and other considerations, has agreed to execute said supersedeas bond as surety; Now,

"Therefore, in consideration of said agreement and other good and valuable considerations, the said Pacific Coast Casualty Company does hereby agree and obligate and bind itself to indemnify, and keep indemnified, the said General Bonding & Casualty Insurance Company against any and all loss, costs, charges, counsel fees, damages and expenses whatever, which said bonding company shall or may sustain or be put to at any time by reason or in consequence of having executed said supersedeas bond as surety.

"Witness its hand, this 6th day of August, 1912.

"PACIFIC COAST CASUALTY COMPANY,

"By JOHN DAVIS,

"Its Attorney at Law and in Fact."

Thereupon Mr. Locke offered in evidence the assignment of the policy.

"Mr. SCOTT.—I would like to make a formal objection to that on the ground that the policy, by the terms thereof, is not assignable, and on the ground that this assignment cannot be made the basis of a cause of action against this defendant for the reason that no payments have been made by the assignees under the terms of this assignment or un-

der the terms of the policy, but that the payment of the judgment by the assignee was a payment made prior to the assignment made on October 22 of this year, whereas the assignment was of November 4, 1913, and such payment is as to the Pacific Coast Casualty Company the payment of a volunteer; that the instrument is immaterial, irrelevant and incompetent as to the Pacific Coast Casualty Company; that furthermore, the assignment appears from the evidence of the plaintiff to have been made in pursuance of a scheme to enable the assured by the assurance and the collusion of the General Bonding Company to avoid and escape its obligation under the policy to make the payment within a certain specified time after the judgment became final. **[131—53]**

"The COURT.—How is that?

"Mr. SCOTT.—It seems that from the evidence as now disclosed in the case, that a stockholder of the assured company, in order to prevent the assured paying the judgment, as according to the terms of its policy it was required to do, threw it into some sort of a proceeding whereby it had a receiver appointed and is now holding its property in *statu quo,* allowing the bonding company to make the payment while it allows the receiver to preserve its property intact until this suit is disposed of.

"The COURT.—There is not enough evidence to show collusion thus far; what you may show hereafter, I cannot tell.

"Mr. LOCK.—And there is no pleading of collusion.

"The COURT.—No, there is no pleading of collusion. I will permit it to go in.

Said assignment was thereupon introduced in evidence. The assignment is set forth as exhibit "J," attached to plaintiff's complaint, and reference is hereby made to said exhibit, and the same is hereby made a part hereof.

DEFENDANT'S EXCEPTION NO. 24.

Thereupon the following documents were offered and received in evidence, to wit: Copy of the amended petition on which the case of Sowders against Elmo Rock Company was tried, and which sets forth the plaintiff's cause of action, which was damages for personal injuries sustained by him while working for the Rock Company; the next was the defendant's amended original answer upon which the case was tried and which sets up affirmative defenses; the next was the charge of the Court to the jury, which charges the jury on those affirmative [132—54] defenses; the next was the verdict of the jury finding for the plaintiff in the sum of $5,000; the next was a judgment in favor of plaintiff and against defendant for $5,000; the next was an order overruling the motion of the Rock Company for a new trial; the next was the supersedeas bond on appeal given by the General Bonding and Casualty Insurance Company in said cause which was in statutory form; the said supersedeas bond is annexed to the complaint of plaintiff on file herein, marked exhibit "E," and reference is hereby made to said

exhibit and said exhibit is hereby made a part hereof. **[133—55]**

Thereupon plaintiff introduced in evidence a mandate from the Court of Appeals to the District Court, a copy of which said mandate is attached to plaintiff's complaint herein, and marked exhibit "G," to which exhibit reference is hereby expressly made, and said exhibit is hereby made a part hereof.

J. W. S. R. S. G.

Plaintiff thereupon introduced in evidence the original execution, ~~which was marked plaintiff's exhibit~~ ——, which was in the words and figures following:

[Exhibit—Original Execution.]

ORIGINAL EXECUTION.

"THE STATE OF TEXAS

To the Sheriff or any Constable of Kaufman County, Greeting:

WHEREAS, on the 18th day of June, 1912, J. B. Sowders recovered a judgment in Cause No. 5774 in the District Court of Kaufman County, against Elmo Rock Company for the sum of Five Thousand Dollars, with interest thereon from the 18th day of June, 1912, at 6 per cent per annum, and all costs of suit, as of record is manifest:

THEREFORE, You are hereby commanded that of the goods and chattels, lands and tenements of the said Elmo Rock Company and General Bonding & Casualty Insurance Company you cause to be made said sum of Five Thousand Dollars, with interest as aforesaid, together with the sum of Two Hundred and Twenty-two 44/100 Dollars, costs adjudged against the said Elmo Rock Company and General

Bonding and Casualty Insurance Company and also the further costs of executing this writ.

HEREIN FAIL NOT, and have you the said moneys, together with this writ, before said Court, at the courthouse thereof, in Kaufman, Texas, on the 19th day of September, 1913.

WITNESS my hand and seal of said Court, this 19th day of August, 1913.

W. W. FRANKLIN,
Clerk District Court, Kaufman County, Texas.
(L. S.)

CLERK'S FEES.

	Dollars.	Cents.
Docketing Cause.....		
Docketing Motions.....		
Issuing 1 Writ Citation.....		.75
Issuing 1 cop. Writ Citation.....		.50
Issuing 1 Certified cop. Petition.....		
Issuing 3 Subpoenas for Witness.....		.75
Issuing 12 Names.....	1	.80
Issuing Subpoena Duces Tecum.....		
Issuing Name.....		
Issuing Notices to Non-resident.....		
Issuing Precept. Interrogatories.....		
Issuing Certified cop. Interrogatories....		
Issuing Commissions to Take Depositions.		
Issuing Execution, and Recording Return..	1	.50
Issuing Order of Sale and Recording Return.....		
Forwarded.....	$5	.30
[134—56] Brought forward.....	$5	.33

Issuing Writ of Attachment and Rec'ding. Return.....	
Issuing Writ of Injunction and Rec'ding Return.....	
Issuing Writ of Sequestration and Rec'ding Return.....	
Issuing Writ of Garnishment and Rec'ding Return.....	
Issuing Writ of.....	
Filing 22 Papers.....	3.30
Entering Appearance.....	.30
Entering Continuance.....	
Entering 6 Orders.....	4.50
Entering Add'nal Length of Order.....	
Entering 1 Judgment.....	1.00
Additional Length of Judgment	
Rec'ding Return on Citation.....	
Rec'ding Return on Notice.....	
Approving 1 Bond.....	1.65
Swearing 15 Witness.....	1.50
Swearing and Impaneling Jury.....	.35
Receiving and Recording Verdict.....	.35
Admin'ing Oath Without Seal.....	
Admin'ing Oath With Seal.....	
14 Certificates With Seal.....	7.00
11 Certificates Witness Claims.....	62.54
Assessing Damages.....	
Transcript....Words.....	10.00

Taxing Costs and Copy	.25
Cost Court of Civil Appeals &	27.40
Supreme Court	
Total Clerk's Fees	$103.94
	1.50
	$105.44

SHERIFF'S FEES:

Executing Citation and .... miles....	2.00
Executing Precept and .... miles....	
Executing Attachment and .... miles....	
Executing Seques'tion and .... miles....	
Executing Garnishment and .... miles....	
Executing Possession and .... miles....	
Executing Injunction and .... miles....	
Executing Scire Facias and .... miles....	
Executing Restitution and .... miles....	
Serving Notice and .... miles....	
Summon'g Witness and .... miles....	13.00
Summon'g Witness and .... miles....	
Jury Fee	
Levying	
Posting	
Appraising	
Advertising	
Taking Care of Property	
Taking Bond	
Making Deed	
Commissions	

Return, Writ of.....

.....

.....

.....

.....

Total Sheriff's Fees..... 15.00

[135—57]

RECAPITULATION:

Clerk's Fees.....

Sheriff's Fees.....

County Judge's Fees.....

Jury Fees.....

Printer's Fees.....

Notary's Fees.....

Stenographer's Fees..... 3.00

Attorney's Fees.....

Witness Fees.....

.....

.....

..... 105.44

Total Costs.....$222.44

I certify that the foregoing Bill of Costs is a true and correct bill of the costs adjudged against the defendant in the cause wherein this Writ of Execution is issued. This 19" day of August, 1913.

W. W. FRANKLIN,

Clerk District Court, Kaufman County, Texas.

By ————————,

Deputy."

Thereupon plaintiff introduced in evidence
J. W. S. the Sheriff's Return, ~~which was marked~~
R. S. G. ~~Plaintiff's Exhibit ——, and~~ which was in the words and figures following:

[Exhibit—Sheriff's Return.]

SHERIFF'S RETURN.

(Acts 1903, p. 104.)

Came to hand the 20 day of August, A. D. 1913, at —— o'clock ———— M., and executed on the 5 day of September, A. D. 1913, at 10 o'clock A. M., by levying upon the following described land and property of the defendant and situated in Kaufman County, Texas, viz.:

Situated in Kaufman County, Texas, being a part of the R. G. Cartwright survey and being Block No. 1 of the subdivision of the D. H. Mallory community estate lands. First Tract Beginning 406 varas North 45° west of the South Corner of 240 acres of land deeded to R. A. Mallory. Thence North 45° West 528 varas to corner. Thence North 49° East 700 varas to corner on Southwest line of 160 acres of land deeded to C. A. Dodd et al. Thence South 45° East 598 varas to corner. Thence South 45° West 680 varas to the place of beginning, containing 66¾ acres of land which is the same land designated as tract No. 1 in the deed from R. A. Mallory to C. M. Kitchen dated August 31, 1900, and duly recorded in the Deed records of Kaufman County, Texas. Second Tract, also a part of the said R. G. Cartwright survey—Beginning at the N. E. corner of Block No. 18 of the McCorkles addi-

tion to the town of Elmo. Thence North 264 feet to corner, Thence East 330 feet corner, Thence South 264 feet corner. Thence West 330 feet to the place of beginning, containing 2 acres of land more or less. Third Tract, Lot No. 2 in Block No. 18 of McCorkles addition to the town of Elmo, Kaufman County, Texas, and being one-half acre more or less. Fourth Tract. Beginning 50 feet North without variation from the N. E. corner of Block No. 14, of said McCorkles addition to said town of Elmo on the North side of said town at the S. E. corner of Block No. 19 of said addition, Thence North without variation 450 varas. Thence North 86° West 215 varas corner. Thence South 35° West 86 vrs. Thence South 2° East 350 vrs. Thence South 86° East 208 varas to the place of beginning, and containing 16 acres of land [136—58] more or less. Said last-named tracts numbered ——, being the same land conveyed by C M K J B W & J D W to Elmo Rock Co. on Aug. 24, 1909, as shown by deed duly recorded in Vol. 128, pages 180, 181, Deed Records, Kaufman County, Texas.

And to the following described property, to wit: One upright Gardner Engine, one independent pump, one Buffords hand forge, two screw vices, eight long-handled shovels, four rock picks, two crow bars, 100 pounds of bolts, one-fourth barrel lubricating oil, one six-inch leather belt 25 feet long, one 10 inch leather belt 25 feet long, one S. Wrench 24 inches, six drill points, one rock crusher, one 12x4 rock screen, 10 pcs. 12x12—24 feet long, six tram cars, 400 feet of tramway, 200 feet 1¼ inch piping,

one concrete tank 6x8, 500 guy wire, 1500 feet, one inch cable, one gasoline engine, one gin tank 4x3, one rock dipper, one closet 4x6x8, 200 feet 2-inch piping, one American hoist derrick boiler, 4 wheeler scrapers, one steam rock drill, one sheet-iron house, 22x28x9, 50 feet galvanized guttering, 5 pcs. sheet-iron roofing, 5x3, said property being levied on as the property of Elmo Rock Company.

And afterwards, on the 5 day of Sept., A. D. 1913, advertised the same for sale at the courthouse door of Kaufman County, on the 7 day of October, A. D. 1913, being the first Tuesday of said month (*by an advertisement, in the English language, published once a week for three consecutive weeks preceding such sale, the first publication appearing not less than twenty days immediately preceding the day of sale, beginning on the 12 day of September, A. D. 1913, in Kaufman Herald, a newspaper published in the County of Kaufman, stating in said advertisement the authority by virtue of which said sale was to be made, the time of levy, the time and place of sale, a brief description of the property to be sold; the number of acres, the original survey, its locality in the county, and the name by which the land is generally known), (by written advertisement posted for twenty successive days next before the day of sale at three public places in the County of Kaufman, one of which is at the courthouse door of said county); and also mailed (delivered or mailed) to each of the within-named defendants a copy of said notice of sale; and also mailed a copy

of said notice of sale to ———, defendant's attorney of record in said cause.

And on the 17th day of September, A. D. 1913, I turned said property over to W. D. Fletcher, Receiver for the said Elmo Rock Company, under orders of the District Court of Kaufman County, Texas. The same was delivered to said Receiver and left in his charge, as it was under the order of the Court. Said Receiver qualifying as receiver on the 20th day of September, 1913.

No property of the General Bonding and Casualty Insurance Company, the other Defendant in execution, found in Kaufman County, Texas.

And on the 7 day of October, A. D. 1913, plaintiff, by his attorney, ordered further execution of this writ stopped by virtue of said order. No sale was made and no collection. Hence, this writ is accordingly herewith and hereby returned.

I actually and necessarily traveled 40 miles in the service of this writ:

W. R. CRANE,
Sheriff, Kaufman County, Texas.
By ————————,
Deputy.

*If no newspaper will publish said advertisement, then so state, strike out the first clause and leave the clause showing advertisement "posted," etc. If published in newspaper, strike out the clause in regard to posting. [137—59]

SHERIFF'S FEES:

Levys $2.00
Advertising..... .... 1.00
Serving 3 Notices at $1.00 each.... .....3.00
Commissions.... ....
Return of Writ.. .... .50
Milage 40 Miles.. .... 2.00
Printer's Fees.... .... 5.00

Total..... ....$13.50
Original Court Costs ....

Total Amount of Costs." $.....

(Back of Original Execution.)

"File No.5774

District. COURT
Kaufman. County
Term 1912

J. B. Sowers
vs. (Execution, with Bill of Costs.
(Fi. Fa. No.———
Elmo Rock Company
& Bonding Casualty Insurance Company.
Issued 19 day of August, 1913
Returnable in 30 days.
W. W. Franklin, Clerk,
Dist. Court Kaufman, County
————————, Deputy
Filed —— day of ———— 19——
————————Clerk
———————— Deputy

Judgment.. .. ..$.....

Interest.... ....
Original Costs.... ....
Subsequent Costs..... ....
. . . .

Total Amount Due.. .....$....."

Thereupon there was introduced in evidence a partial transcript of the proceedings in the Court of Civil Appeals; said document ~~was marked Plaintiff's Exhibit ——, and~~ is in the words and figurers following:

J. W. S.
R. S. G.

Exhibit—Partial [Transcript of Proceedings in Court of Civil Appeals.]

"In the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas. **[138—60]**

No. 6840.

ELMO ROCK COMPANY,

Appellant,

v.

J. B. SOWDERS.

Appellee.

PARTAL TRANSCRIPT OF PROCEEDINGS.

1.

From District Court, Kaufman County.

Saturday, March 15th, 1914.

6840

JUDGMENT.

ELMO ROCK COMPANY,

vs.

J. B. SOWDERS.

Opinion of the Court delivered by Mr. Rainey, Chief Justice. This cause came on to be heard on the transcript of the record and the same being inspected, because it is in the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed, that the appellee, J. B. Sowders, do have and recover of appellant, Elmo Rock Company, and General Bonding and Casualty Insurance Company, its surety upon appeal bond, the amount adjudged below and all costs in this behalf expended and this decision be certified below for observance.

2.

Saturday, March 29th, 1914.

6019

6840

ORDER OVERRULING APPELLANT'S. MOTION FOR REHEARING.

ELMO ROCK COMPANY,

vs.

J. B. SOWDERS.

This day came on to be heard the motion of appellant for rehearing of this cause and the same being inspected, it is considered, adjudged and ordered that the said motion be overruled.

3.

From Kaufman County, Fifth District.

May 28, 1913.

Certified Copy of Judgment of Supreme Court.

"IN SUPREME COURT OF TEXAS.

ELMO ROCK COMPANY,

vs.

J. B. SOWDERS.

This day came on to be heard the application of Elmo Rock Company, for a writ of error to the Court of Civil Appeals for [139—61] the Fifth District, and the same having been duly considered, it is ordered that said application be refused. That the applicant Elmo Rock Company, and its surety, General Bonding & Casualty Insurance Company pay all costs incurred on its application.

I, F. T. CONNERLY, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above-styled cause.

Witness my hand and seal of said court, this the 30th day of June, A. D. 1913.

F. T. CONNERLY,
Clerk,

[Seal] By————————Deputy.

Motion for rehearing overruled June 27, 1913.

[Endorsed]: "Application No. 8202 Elmo Rock Company vs. J. B. Sowders. Copy of Judgment in Supreme Court. Application for writ of error refused."

[Endorsed]: "Filed in Court of Civil Appeals Jul. 5, 1913. Geo. W. Blair, Clerk 5th District."

4.

BILL OF COSTS IN SUPREME COURT.

Clerk's Office, Supreme Court.

No. 8202.

ELMO ROCK COMPANY,

vs.

J. B. SOWDERS.

CERTIFIED COPY BILL OF COSTS SUPREME COURT.

Filing Application	50
Docketing Petition	50
Entering Appearance of Counsel	50
Filing two Briefs	60
Filing Three Papers	90
Entering Orders	1.00
Entering Judgment on Application	1.00
Certified Copy of Judgment,	1.00
Taxing Costs of Application	50
Certified Copy Bill of Costs,	1.00
Filing and Entering Motion	.55
Total,	8.05

I, F. T. CONNERLY, Clerk of the Supreme Court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

WITNESS MY HAND and seal of said court at Austin, this the 30th day of June, 1913.

[Seal] F. T. CONNERLY,
Clerk, [140-62]

[Endorsed]: "Application. No. 8202. Certified Copy Bill of Costs in Supreme Court, Austin. Elmo Rock Company vs. J. B. Sowders, $8.05. Filed in Court of Civil Appeals Jul. 5, 1913, Geo. W. Blair, Clerk 5th District."

The State of Texas,
County of Dallas.

I, Geo. W. Blair, Clerk of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, do hereby certify that the foregoing partial transcript of proceedings had in the cause formerly pending in said court and entitled Elmo Rock Company, appellant, v. J. B. Sowders, appellee, and numbered 6840 upon the docket of said court, comprises a full, true and complete copy of each of the papers, file marks, entries and proceedings in said cause therein purporting to be shown, to wit:

1. Judgment of said Court of Civil Appeals.
2. Order overruling appellant's motion for rehearing.
3. Certified copy of Judgment of Supreme Court.
4. Bill of costs in Supreme Court.

In testimony whereof I have hereunto set my hand and the seal of said court at my office in Dallas, Dallas County, Texas, this the 1st day of May, 1914.

GEO. W. BLAIR,
Clerk of Court of Civil Appeals for the Fifth Supreme Judicial District of Texas.

The State of Texas,
County of Kaufman.

I, Anson Rainey, Chief Justice of the Court of Civil Appeals for the Fifth Supreme Judicial

District of Texas, do hereby certify that George W. Blair, is the clerk of said court, and that his foregoing attestation is in due form.

Witness my hand this the 1st day of May, 1914.

ANSON RAINEY,

Chief Justice of Court of Civil Appeals for Fifth Supreme Judicial District of Texas.

The State of Texas,
County of Dallas.

I, Geo. W. Blair, Clerk of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, do hereby certify that Anson Rainey is the Chief Justice of said court and that his genuine signature is appended to the foregoing certificate.

Given under my hand and the seal of said court at my office in Dallas, Dallas County, Texas, this the 1st day of May, 1914.

[Seal] GEO. W. BLAIR,

Clerk of Court of Civil Appeals for 5th Supreme Judicial District of Texas." **[141—63]**

J. W. S. R. S. G.

Thereupon plaintiff introduced, and there was received in evidence ~~and marked Exhibit~~ ——, a partial transcript of the proceedings in the Supreme Court, in the words and figures following, to wit:

"IN THE SUPREME COURT OF TEXAS.

App. No. 8202.

ELMO ROCK COMPANY,

vs.

J. B. SOWDERS.

PARTIAL TRANSCRIPT OF PROCEEDINGS.

ORDER REFUSING WRIT OF ERROR.

From Kaufman County, Fifth District

App. No. 8202.

May 28th, 1913

ELMO ROCK COMPANY,

vs.

J. B. SOWDERS.

This day came on to be heard the application of the Elmo Rock Company for a writ of error to the Court of Civil Appeals for the Fifth District, and the same having been duly considered, it is ordered that said application be refused; that the applicant, Elmo Rock Company, and its surety General Bond & Casualty Insurance Company, pay all costs incurred on this application.

ORDER OVERRULING MOTION FOR REHEARING.

From Kaufman County, Fifth District.

Mo. No. 2979.

App. No. 8202.

June 25th, 1913.

ELMO ROCK COMPANY,

vs.

J. B. SOWDERS.

Motion for rehearing of App. No. 8202,—MOTION OVERRULED.

The State of Texas,
County of Travis.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, do hereby certify that the foregoing partial transcript of proceedings had in the cause formerly pending in said court upon application for a writ of error, and entitled Elmo Rock Company vs. J. B. Sowders, and numbered 8202 upon the application docket of said court, comprises a full, true and complete copy of each of the entries and proceedings in said cause therein purporting to be shown, to wit:

1. Order refusing writ of error;
2. Order overruling motion for rehearing. **[142–64]**

IN TESTIMONY WHEREOF I have hereunto set my hand and the seal of said court at my office in Austin, Travis County, Texas, this the 1st day of May, 1914.

[Seal] F. T. CONNERLY,
Clerk of Supreme Court of Texas.

The State of Texas,
County of Travis.

I, Thomas J. Brown, Chief Justice of the Supreme Court of Texas, do hereby certify that F. T. Connerly is the Clerk of said Court, and that his foregoing attestation is in due form.

WITNESS MY HAND this the 1st day of May, 1914.

T. J. BROWN,
Chief Justice of Supreme Court of Texas.

The State of Texas,
County of Travis.

I, F. T. CONNERLY, Clerk of the Supreme Court of Texas, do hereby certify that Thomas J. Brown is the Chief Justice of said court, and that his genuine signature is appended to the foregoing certificate.

GIVEN UNDER MY HAND and the seal of said court at my office in Austin, Travis County, Texas, this the 1st day of May, 1914.

[Seal] F. T. CONNERLY,
Clerk of Supreme Court of Texas."

Thereupon there was introduced and received in evidence, ~~and marked Plaintiff's Exhibit~~ ——, document entitled "Partial Transcript of Proceedings," in the District Court, in the Receivership case, which document was in the words and figures following, to wit:

J. W. S.
K. S. G.

[Exhibit—Partial Transcript of Proceedings in District Court in Receivership Case.]

IN THE DISTRICT COURT OF KAUFMAN, COUNTY, TEXAS.

No. 6007.

NELLIE WHITFIELD, Administratrix of the Estate of J. B. WHITFIELD, Deceased,

vs.

ELMO ROCK COMPANY.

PARTIAL TRANSCRIPT OF PROCEEDINGS.

[143–65]

1.

Plaintiff's Original Petition.

"No. —

In the District Court of Kaufman County, Texas.

Sept. Term, A. D. 1913.

Mrs. NELLIE WHITFIELD, Adminstratrix,

vs.

ELMO ROCK COMPANY et al.

To the Hon. F. L. HAWKINS, Judge of said Court:

Your petitioner, Mrs. Nellie Whitfield, Administratrix of the Estate of J. B. Whitfield, deceased, complaining of The Elmo Rock Company, a corporation, respectfully shows to the Court:

FIRST.

That the plaintiff resides in Terrell, Kaufman County, Texas, and has been duly appointed administratrix of the Estate of J. B. Whitfield, dec'd, by the Probate Court of Kaufman County, Tx., and has been duly qualified as such; that the Elmo Rock Company is a corporation, having its principal office and place of business in the City of Terrell, Kaufman County, Texas; that J. B. Whitfield was formerly President of said Corporation, but is now deceased, and A. B. Casgrain was formerly its Vice-president, but he has now left the State of Texas, as petitioner is informed and believes, and his whereabouts are unknown; that there is now but one officer known to this plaintiff, of said Corporation; to wit: J. D. Whitfield, Secretary and Treasurer thereof, who resides at Heath, Rockwall County, Texas.

SECOND.

Your petitioner shows that the estate of J. B. Whitfield, deceased, of which petitioner is administratrix, owns and holds a majority of the capital stock of The Elmo Rock Company, to wit, the sum of about $5500.00; that said Elmo Rock Company was engaged in the business of mining and quarrying rock and stone, having its quarry and crusher located in the town of Elmo, Kaufman County Texas; that said plant was in operation up to the time of the death of the said J. B. Whitfield, which accured in December, 1912; that since the death of the said Whitfield said plant has ceased to be operated; that the Directors of said Corporation have never elected any other President or Vice-president, and that in fact there are no Directors of said Corporation left, except the said J. D. Whitfield; and that said J. D. Whitfield has long since ceased to give any attention to the affairs of said company; that said Elmo Rock Company owns large and valuable properties; to wit an undivided one-half interest in 66¾ acres of land on the R. G. Cartwright Survey in Kaufman County, Texas; two acres of land on the same survey; one-half acre of land on the same survey, and 16 acres, more or less, on the same survey, more fully described in exhibit "A" hereto attached and made a part hereof together with its rock-crushing plant, machinery, boilers, engines, tools, tram cars and other appurtenances and appliances.

THIRD.

Your petitioner shows to the Court that since the death of the said Whitfield, said machinery and

rock-crushing plant of said Elmo Rock Company has not been operated, and that said properties have received no care or attention at the hands of any officer of said Company; that the tools and appliances are being wasted and destroyed; that the machinery is being exposed to the elements, and is deteriorating rapidly, and that it is necessary that some one should take charge of the business for the purpose of winding up its affairs, selling off its assets and paying its debts. [144—66]

FOURTH.

Your petitioner shows to the Court that said Elmo Rock Company is largely indebted to divers and sundry persons, approximating the sum of $15,000.00; that said debts are all past due, and creditors are demanding their payment; that there is no money in the treasury of said Company, and it has no other assets except the lands above herein described, and the plant situated thereon; that the assets of said Company are totally inadquate to pay its debts, and said Company is and has been for many months insolvent.

Wherefore, premises considered, plaintiff prays that your Honor appoint a Receiver to take charge of the business and assets of said Elmo Rock Company, and proceed to wind up its affairs, sell its properties and pay off its indebtedness, and for such other and further orders and decrees as to the Court may seem proper.

DASHIEL L, CRUMBAUGH & COON,
Attorneys for Plaintiff.

BEFORE me, the undersigned authority, on this day personally appeared C. M. Crumbaugh, who

being duly sworn says on oath that he is one of the attorneys for the plaintiff in the above-styled cause, and that the matters and facts set out in the above plea are true, to the best of his knowledge and belief.

C. M. CRUMBAUGH.

Subscribed and sworn to before me, this 16th day of September, A. D. 1913.

[Notarial Seal] C. G. COFFEY,
Notary Public, Kaufman County, Texas.

'EXHIBIT A.'

Situate in Kaufman County, Texas, being a part of the R. G. Cartwright Survey and being block No. 1, of the subdivision of the D. H. Mallory community estate lands.

FIRST TRACT.

Beginning 406 varas North 45 deg. West of the South corner of the 240 acres of land deed to R. A. Mallory. Thence North 45 deg. West 528 Varas to corner. Thence North 49 deg. East 700 varas to corner on Southwest line of 160 acres of land deeded to C. A. Dodd, et al. Thence South 45 deg. East 598 varas to corner. Thence South 45 deg. West 680 varas to the place of beginning. Containing 66 3/4 acres of land, which is the same land designated as Tract No. 1, in the deed from R. A. Mallory to C. M. Kitchen, dated August 31, 1900, and duly recorded in the Deed Records of Kaufman County, Texas.

SECOND TRACT.

Also a part of the said R. G. Cartwright Survey, Beginning at the N.E. corner of Block No. 18, of the

McCorkles Addition to the town of Elmo. Thence North 264 feet to corner. Thence East 330 feet corner. Thence South 264 feet corner. Thence West 330 feet to the place of beginning, containing 2 acres of land, more or less.

THIRD TRACT.

Lot No. 2 in Block No. 18, of McCorkles Addition to the town of Elmo, Kaufman County, Texas, and being one-half acre, more or less.

FOURTH TRACT.

Beginning 50 feet North without variation from the N. E. corner of Block No. 14 of said McCorkles Addition to said town of Elmo on the north side of said town at the S. E. corner of Block No. 19 of said addition. Thence North without variation **[145—67]** 450 varas. Thence North 86 deg. West 215 varas, corner. Thence South 35 deg. West 86 varas. Thence South 2 deg. East 350 varas. Thence South 86 deg. East 208 varas to the place of beginning, and containing 16 acres of land, more or less.

Filed Sept. 7th, 1913. W. W. Franklin.
Vol. 16—106–107."

2.

WAIVER OF SERVICE BY ELMO ROCK COMPANY.

"No. ——.

Sept. Term, 1913.

In the District Court of Kaufman County, Texas.

Mrs. NELLIE WHITFIELD, Administratrix,

vs.

ELMO ROCK COMPANY.

Comes now J. D. Whitfield, Secretary and Treasurer of the Elmo Rock Company, and being fully advised of the application of the plaintiff for a Receivership against the said Elmo Company, hereby waives the issuance of citation and service of same, and enters an appearance for the said Elmo Rock Company, defendant in said cause, at this present September Term of the District Court, and joins in with said plaintiff in her prayer for a Receiver.

J. D. WHITFIELD,

Secretary and Treasurer of the Elmo Rock Company."

3.

ORDER APPOINTING RECEIVER ENDORSED ON PETITION.

"Sept. 17th, 1913.

This day came on to be heard the application of Mrs. Nellie Whitfield administratrix of the estate of J. B. Whitfield, deceased, praying for the appointment of a Receiver for The Elmo Rock Company, a corporation duly organized under the laws of Texas and having its principal place of business at Elmo in Kaufman County, Texas; And it appearing to the court from allegations in petition that said Elmo Rock Company is insolvent and that its assets are being wasted and dissipated and that there is no officer or other proper person in charge of the affairs of said corporation and that it is necessary that some one should be placed in charge thereof to preserve the property and wind up the business of said corporation; and it further appearing to the Court from said petition that said Elmo Rock

Company is largely indebted; and it further appearing to the Court that W. D. Fletcher a citizen of Terrel, Kaufman County, Texas, is a proper person to be appointed Receiver for said corporation;

It is therefore ordered by the Court that said W. D. Fletcher be and he is hereby appointed Receiver of said Elmo Rock Company, and his bond as such Receiver is fixed at the sum of $2500.00; it is further ordered by the Court that upon the said W. D. Fletcher **[146—68]** filing in this said court his said bond with two good and sufficient sureties to be approved by this court and taking the oath required by law, that he take possession of all the assets and properties of said The Elmo Rock Company of every kind and character, and that he hold same subject to the further orders of this court.

F. L. HAWKINS,
Judge 40th Judicial District."

4.

BOND AND OATH OF RECEIVER.

In the District Court of Kaufman County, Texas.

Mrs. NELLIE WHITFIELD, Administratrix,

vs.

ELMO ROCK COMPANY.

The State of Texas,
County of Kaufman.

KNOW ALL MEN BY THESE PRESENTS: That we, W. D. Fletcher, as principal, and Commonwealth Bonding & Casualty Ins. Co., as sureties, are held and firmly bound unto F. L. Hawkins, Judge of the 40th Judicial District of Texas, in the penal

sum of Twenty-five Hundred ($2500.00) Dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas, the said W. D. Fletcher has been appointed by Hon. F. L. Hawkins, Judge of the 40th Judicial District of Texas, Receiver for the Elmo Rock Company, in the action of Mrs. Nellie Whitfield, Administratrix, vs. The Elmo Rock Company.

NOW, if the said W. D. Fletcher shall faithfully discharge all of the duties of Receiver in said action, and obey to orders of the Court therein, then this obligation shall be null and void, otherwise to remain in full force and effect.

Witness our hands, this 19th day of September, A. D. 1913.

W. D. FLETCHER,
COMMONWEALTH BONDING & CASUALTY INS CO.
By CLARENCE G. COFFEY,
Attorney in Fact.

The State of Texas,
County of Kaufman.

I, W. D. Fletcher, Receiver of the The Elmo Rock Company, solemnly swear that I will faithfully perform all the duties of Receiver of said Elmo Rock Company, to the best of my skill and ability.

[Seal] W. D. FLETCHER,

Subscribed and sworn to before me, this 18th day of September, A. D. 1913.

C. G. COFFEY,
Notary Public, Kaufman County, Texas.

Filed Sept. 20th, 1913. W. W. Franklin, District Clerk." [147—69]

5.

In the District Court, Kaufman County, Texas,
Oct. 31, 1913.

No. 6007.

ORDER FOR TRANSFER OF LIABILITY POLICY.

"MRS. NELLIE WHITFIELD, Administratrix,
vs.
ELMO ROCK COMPANY.

The receiver of the Elmo Rock Company heretofore appointed by the Court is authorized by said Court to assign and deliver to the General Bonding and Casualty Insurance Company Policy No. M. E. 36696 issued by the Pacific Coast Casualty Company to the Elmo Rock Company.

The State of Texas,
County of Kaufman.

I, W. W. Franklin, clerk of the District Court of Kaufman County, Texas, do hereby certify that the foregoing partial transcript of proceedings had in the cause pending in said court and entitled Nellie Whitfield, Administratrix, v. Elmo Rock Company, and numbered 6007 upon the docket of said court, comprises a full, true and complete copy of each of the papers, entries and proceedings in said cause

therein purporting to be shown, each paper, entry and proceeding being found upon the page or pages indicated by the following list:

1. Plaintiff's original petition, pp. 1–3.
2. Defendant's waiver of service, p. 3.
3. Order appointing receiver, pp. 3–4.
4. Bond and oath of receiver, pp. 4–5.
5. Order for transfer of liability policy, p. 5.

In testimony whereof I have hereunto set my hand and the seal of said court at my office in Kaufman, Kaufman County, Texas this the 1" day of May, 1914.

[Seal] W. W. FRANKLIN,
Clerk of District Court, Kaufman County, Texas.

The State of Texas,
County of Kaufman.

I, F. L. Hawkins, Judge of the District Court of Kaufman County, Texas, do hereby certify that W. W. Franklin is the clerk of said court, and that his foregoing attestation is in due form.

Witness my hand this the 1st day of May, 1914.

F. L. HAWKINS,
Judge of District Court, Kaufman County, Texas.

The State of Texas,
County of Kaufman.

I, W. W. Franklin, clerk of the District Court of Kaufman County, Texas, do hereby certify that F. L. Hawkins is the Judge of said court and that his genuine signature is appended to the foregoing attestation.

Given under my hand and the seal of said court at

my office in Kaufman, Kaufman County, Texas, this the 1st day of May, 1914.

[Seal] W. W. FRANKLIN,
Clerk of District Court of Kaufman County, Texas."
[148—70]

"The next is the original *alias* execution issued but never executed.

"The COURT.—Well, I don't think that that is very material.

"Mr. LOCKE.—I don't either, but for whatever its effect may be as showing the history of the whole transaction I offer it.

"The next is a receipt from the Clerk of the District Court for $160.40, for costs.

"The next is a draft made by the plaintiff—

"Mr. SCOTT.—We can dispose of that by an admission that we have not paid the judgment, although repeatedly asked to do so.

"Mr. LOCKE.—This is a draft for the amount which we are suing for, which was protested.

"We are ready to rest.

Motion for a Nonsuit.

"Mr. SCOTT.—The defendant at this time desires to move your Honor for a nonsuit in this case upon the following grounds:

"That it appears from the evidence affirmatively that Mr. Davis was not authorized to sign an indemnity agreement or to secure a bond on behalf of this defendant, the Pacific Coast Casualty Company.

"That it affirmatively appears from the evidence that this lack of authority was brought to the notice of the General Bonding Company at the time the

bond was applied for by Mr. Davis and issued, on the ground that Mr. Davis was not the agent of the defendant, the Pacific Coast Casualty Company, in that transaction; on the further ground that the assignment or purported assignment of the policy of insurance to the General Bonding Company is invalid and void, that said policy of insurance was not assignable at that **[149—71]** time, that said policy of insurance is a policy of indemnity against loss by the assured, the Elmo Rock Company; that the Elmo Rock Company has never suffered loss has been called upon to pay and has never paid anything in connection with the case of Sowders vs. Elmo Rock Company.

"Upon the further ground that it appears affirmatively that the Elmo Rock Company was unable to pay the judgment and was insolvent. On the further ground that it appears affirmatively that the General Bonding Company and the Elmo Rock Company cooperated in an effort whereby the Elmo Rock Company did not pay and was not called upon to pay the judgment in the case of Sowders vs. The Elmo Rock Company. That said action taken at the instance of the Elmo Rock Company and with the co-operation of the plaintiff herein was designed specifically to deceive this defendant."

If your Honor please, I desire briefly to state our views in reference to this case and to this motion—

The COURT.—I do not think I would expend much time in presenting it at this time; I should not be disposed to grant the motion without further consideration. The better way would be to submit it

and take a formal ruling and proceed with the case.

Mr. SCOTT.—We have no evidence to submit. We rest here.

The COURT.—You submit your cause then, Mr. Scott, on the motion for nonsuit?

Mr. SCOTT.—I do, your Honor.

Thereupon the cause was submitted on briefs to be filed, 20, 20 and 10 days; thereafter upon the filing of said briefs said motion for nonsuit was denied.

DEFENDANT'S EXCEPTION NO. 25.

Thereupon the Court rendered judgment in favor of the plaintiff. [150—72]

[Stipulation as to Bill of Exceptions.]

IT IS HEREBY STIPULATED by and between the parties hereto that the defendant has prepared and duly served upon the attorneys for the plaintiff herein within due time a proposed bill of exceptions; that the Judge of the above-entitled court duly designated a time and place as the time and place at which he would settle the said bill of exceptions; that both parties having been informed of the time for settling the bill of exceptions as designated by the Judge, the matter came on regularly for hearing for the purpose of settling the said bill of exceptions, and the attorneys for both parties were there present; that thereupon the form and contents of said bill of exceptions; that the foregoing engrossed bill of exceptions conforms to the truth, and is in proper form, and presented, settled and allowed within due time; that it contains all the evidence submitted in the above entitled action; that said bill is a true bill of exceptions, and the same may be approved, allowed and ordered

filed, and made a part of the record in said cause.

Dated December 15th, 1915.

LOCKE & LOCKE,
R. S. GRAY,
Attorneys for Plaintiff.
MYRICK & DEERING,
JAMES WALTER SCOTT,
Attorneys for Defendant. **[151—73]**

In the District Court of the United States, for the Northern District of California, Second Division.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

Order Allowing, Settling and Certifying Bill of Exceptions.

It appearing to the Court that the statements contained in the foregoing stipulation are, and that each of them is, true, and it further appearing to this Court that said bill of exceptions conforms to the truth, and is in proper form, and contains all the evidence on the trial of the above-entitled action, IT IS THEREFORE ORDERED that said bill is a true bill of exceptions, and the same is hereby approved, allowed and settled, and ordered filed, and made a part of the record of said cause.

Done in open court this 31st day of December, A. D. 1915.

(Sgd.) WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 31, 1915. Walter B. Maling, Clerk. [152—74]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,723.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,
Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,
Defendant.

Petition for Writ of Error.

Comes now the Pacific Coast Casualty Company, a corporation, defendant in the above-entitled action, and shows to the Court that on or about the 15th day of September, 1915, this Court entered judgment in said action in favor of the plaintiff and against this defendant, for the sum of Six Thousand One Hundred Sixty and 43/100ths ($6,160.43) Dollars, and the costs of the action, and that in the judgment and the proceedings in said action prior thereto, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors and specifications of insufficiencies of the evidence to sustain the findings of the

Court, which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error issue in its behalf out of the United States Circuit Court of Appeals, for the Ninth Circuit, for a correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the said Circuit Court of Appeals, and that an order be made fixing the amount [153] of a bond which will operate to supersede the said judgment.

MYRICK & DEERING,
JAMES WALTER SCOTT,
Atttorneys for Defendant.

[Endorsed]: Filed Oct. 28, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [154]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,723.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

Assignment of Errors.

Comes now the Pacific Coast Casualty Company, a corporation, defendant in the above-entitled action, and in connection with its petition for a writ of error herein makes the following assignment of errors on

which it will rely, and which it will urge on the prosecution of said writ of error in the above-entitled action, which errors occurred at the trial of said cause, to wit:

I.

The Court erred in this, in that it denied defendant's motion to compel plaintiff to elect between separate causes of action set up in the complaint. Said action and proceedings thereon were as follows:

Mr. SCOTT.—The defendant, if your Honor please, before the taking of the evidence begins, desires to move that the plaintiff be directed to elect between the three separate causes of action which, to our mind, are set up in the complaint, and to now state whether they are suing as assignee of the Elmo Rock Company by virtue of the assignment said to have been received by the receiver in a certain action in Texas, or whether they are proceeding on the theory that they, as surety, are subrogated [155] to certain rights of the Elmo Rock Company. All three matters are set forth in the complaint. We demurred.

The COURT.—The demurrer was overruled, was it not?

Mr. SCOTT.—Yes; we demurred on these same grounds.

The COURT.—Your motion will be denied. The complaint does not strike me as presenting a question of duplicity at all. The action is on the casualty bond, as I view it, under the subrogation of the present plaintiff to the rights of the Elmo Rock Company. The action proceeds upon the theory that this plain-

tiff, having under the compulsion of this supersedeas bond given on appeal in the action for personal injury paid the judgment, and thereafter having been under the authority of the Court given an assignment by the receiver of the Rock Company of that company's rights under this policy of indemnity, that they are now entitled to sue the present defendant for the right which otherwise had the rock company not gone into the hands of a receiver would be exerting itself. That is the theory of the action, as I understand it.

Mr. LOCKE.—That is the main theory. We do not discuss the existence and legal effect of this indemnity bond.

The COURT.—That is merely auxiliary.

Mr. LOCKE.—That is one of the circumstances, one of the inducements, merely.

The COURT.—That was the theory upon which the demurrer was overruled, and upon that theory I could not compel them to elect.

Mr. SCOTT.—We wish to make the motion in aid of the demurrer so as to exercise our point, and we take an exception.

The COURT.—Very well. **[156]**

(To said ruling of said Court the defendant thereupon duly excepted.)

II.

The Court erred in overruling the defendant's objection to question propounded to witness Angus G. Wynne, with respect to steps taken by him after the judgment of the lower court was affirmed in the case of Sowders vs. Elmo Rock Company, as follows:

"Q. What steps did you take after filing of the mandate for the collection of the judgment?

Mr. SCOTT.—We object to that as calling for secondary evidence and not the best evidence.

The COURT.—The objection is overruled."

(To which ruling the defendant took an exception.)

III.

The Court erred in denying the defendant's motion to strike out the latter portion of the answer to the question referred to in the foregoing assignment of error upon the ground that said portion of said answer was hearsay. The following proceedings occurred:

"Q. What steps did you take after filing of the mandate for the collection of the judgment?

Mr. SCOTT.—We object to that as calling for secondary evidence and not the best evidence.

The COURT.—The objection is overruled.

A. I applied to the firm of Meador & Davis, at Dallas, Texas, in person and by letter. They stated to me that their client would pay the money and it would come forward in a few days.

Mr. SCOTT.—We move that the latter portion of the answer go out as hearsay. [157]

The COURT.—The motion is denied."

(To which ruling the defendant took an exception.)

IV.

The Court erred in denying the motion of defendant to strike out the following portion of the answer of witness Angus G. Wynne, viz: "Mr. Sowders and ourselves assigned together with the First State Bank at Terrell I believe, our interest in this judg-

ment to the General Bonding and Casualty Insurance Company."

The proceedings in that regard were as follows:

WITNESS stated.—"I had taken the matter up with the General Bonding & Casualty Insurance Company and they had asked me to proceed against the Rock Company and I had *alias* execution issued and caused the same to be issued on the 9th day of October, 1913, against the Elmo Rock Company and the General Bonding & Casualty Insurance Company.

Q. To what county?

A. To Dallas county. That execution I presented in person to the General Bonding & Casualty Insurance Company, and they paid to Mr. Sowders and to myself the money, costs and interest called for in said *alias* execution. Mr. Sowders and ourselves assigned together with the First State Bank at Terrell, I believe, our interest in this judgment to the General Bonding & Casualty Insurance Company.

Mr. SCOTT.—We move that the latter part of the answer go out as immaterial, irrelevant and incompetent, and not within the issues of the case.

The COURT.—Oh, I don't think that does any harm. Proceed.

(To said ruling of said Court, defendant thereupon duly excepted.) [158]

V.

The Court erred in overruling defendant's exception to the question propounded to witness C. M. Crumbaugh, that his testimony was not the best evidence. The proceedings in that respect were as follows:

"Q. Please state what you know about the proceedings connected with the payment of this judgment in so far as Elmo Rock Company and its Receiver were concerned.

Mr. SCOTT.—We object to that on the ground that the record is the best evidence.

The COURT.—The objection is overruled. It would not necessarily be the record.

A. After the judgment was rendered in the District Court the case wts duly appealed and finally a writ of error denied, I believe, by the Supreme Court, and execution was issued by the plaintiff in the case and levied on all of the property of the Elmo Rock Company, covering the land and all the personal property. I did not discover that that execution had been issued until I noticed that it had been posted, and I think the land was to be sold—I think perhaps it was about only two or three days before the land was to be sold when I first discovered that the property had been seized, and in order to keep the assets of the corporation from being used for the purpose of paying off this indebtedness, I applied at once to the District Court for a receivership, and had all of the property put in the hands of a Receiver and stopped the execution."

(To said ruling of said Court, defendant thereupon duly excepted.)

VI.

The Court erred in denying defendant's motion to strike [159] out certain portions of the foregoing answer which dealt with matters of record as not the best evidence, and to said ruling of said Court, the

defendant then and there duly excepted. The proceedings which occurred in this connection were as follows:

"Q. Please state what you know about the proceedings connected with the payment of this judgment in so far as Elmo Rock Company and its Receiver were concerned.

Mr. SCOTT.—We object to that on the ground that the record is the best evidence.

The COURT.—The objection is overruled. It would not necessarily be the record.

A. After the judgment was rendered in the District Court, the case was duly appealed and finally a writ of error denied, I believe, by the Supreme Court, and execution was issued by the plaintiff in the case and levied on all the property of the Elmo Rock Company, covering the land and all the personal property. I did not discover that that execution had been issued until I noticed that it had been posted, and I think the land was to be sold—I think perhaps it was about only two or three daps before the land was to be sold when I first discovered that the property had been seized, and in order to keep the assets of the corporation from being used for the purpose of paying off this indebtedness, I applied at once to the District Court for a Receivership and had all of the property put in the hands of a Receiver and stopped the execution.

Mr. SCOTT.—We move to strike out the portion of the answer which deals with matters of record, as not the best evidence.

The COURT.—These are matters that are entirely

within [160] the personal knowledge of an attorney; he is not stating the contents of a record at all. He is statings steps that were taken. Motion denied."

(To said ruling of said Court, defendant took an exception.)

VII.

The Court erred in overruling the defendant's objection to the question propounded to said last-named witness by Mr. Locke, as follows:

"Q. In the conference that took place in the court between yourself and Mr. Cosnahan and Judge Hawkins, it was requested and understood by all the parties that the surety company was to pay this judgment in behalf of the Elmo Rock Company, because it was surety on the supersedeas bond, and that it desired the transfer of the policy in consideration of such payment?

Mr. SCOTT.—We object to that on the ground that it is not redirect examination, and further, that it is immaterial, irrelevant and incompetent; and more particularly, if your Honor please, upon this ground, that the assignment of this policy we claim cannot be the basis of an action against this defendant for the reason that the policy has never been performed—by the terms of the policy requiring payment by the assured—was never performed prior to the assignment that the assignee has never acted under the policy that the assignee of the policy made its payment a considerable time before the policy was assigned to it, and in making the payment was—so far as this defendant is concerned—purely a volunteer.

We therefore object to that evidence.

The COURT.—The objection is overruled.

A. Yes, sir, that was the understanding. [161]

(To which ruling of said Court defendant thereupon duly excepted.)

VIII.

The Court erred in denying defendant's motion to strike out that portion of the answer of witness Leeds which refers to an indemnity bond obtained through Meador & Davis. In that connection the following proceedings occurred:

"Q. What, if anything, within your knowledge, was done with reference to the making of a supersedeas bond in that case?

A. We had the bond made by the General Bonding & Casualty Company of Dallas after securing an indemnity bond from the Pacific Coast Casualty Company through the attorneys Meador & Davis.

Mr. SCOTT.—I move that the latter part of the answer go out, 'after securing an indemnity bond from the Pacific Coast Casualty Company through the attorneys, Meador & Davis,' Meador & Davis appears to be the name of a firm of attorneys at law who represent the defendant. There is no authority shown.

The COURT.—That authority can be shown by the acts of the parties.

Mr. SCOTT.—It has not been shown.

The COURT.—I say it may be shown by this very method. If it appears thereafter that no objection was ever taken to what they did in the matter, the jury has the right to infer authority. Objection

overruled. . . . Now, Mr. Scott, I see what your suggestion is as to the statement of the witness that they secured the indemnity from the Pacific Coast Casualty Company through Meador & Davis. [162]

Mr. SCOTT.—Yes, your Honor.

The COURT.—I would not regard that as proof of authority.

Mr. LOCKE.—We simply prove that to show the connection of the indemnity bond with the case.

The COURT.—Yes, motion denied."

(To said ruling of said Court, defendant thereupon duly excepted.)

IX.

The Court erred in denying defendant's motion to strike out the answer of witness Leeds to the question propounded by Mr. Locke, said motion being made upon the ground that said answer was merely conjecture and not the best evidence. The proceedings in that connection were as follows:

"Q. Did you inform the Terrell people, your agents, or the Galveston agents, about the action that you had taken in reference to this bond?

A. I think that we were instructed, or we were authorized by J. F. Seinsheimer & Company, at Galveston, to have the bond made for the Pacific Coast Casualty Company. Of course I am not positive of that, as I would have to refer to the files to see, but my impression now is that we were authorized by J. F. Seinsheimer & Company, of Galveston, to have the bond executed.

Mr. SCOTT.—That we move to go out as merely the conjecture of the witness, and not the best evidence.

Mr. LOCKE.—That is all that any memory can be.

Mr. SCOTT.—The best evidence would be the written instrument from Galveston, Texas, authorizing them. He said he would have to refer to the files to see. [163]

The COURT.—Well, this does not do any harm.

Mr. SCOTT.—It might qualify materially the question as to whether or not they were authorized to enter into dealings with reference to the bond.

The COURT.—The Court is bound to recognize at this day, when so very largely business is done when people are within reasonable proximity to each other through the telephone and over the telephone, that I do not think that the same strictness of rule would apply to evidence of that character. He may have had in his mind a conversation over the telephone. Motion denied."

(To said ruling of said Court, defendant thereupon duly excepted.)

X.

The Court erred in denying the defendant's motion to strike out the answer of witness John B. Stephenson to question propounded by Mr. Locke, upon the ground that said answer was incompetent and no proper foundation for the introduction of such evidence had been laid. In that connection the following proceedings occurred:

"Q. Please state as nearly as you can remember them, the negotiations that led up to the making of that bond. Give the history of the transaction.

Mr. SCOTT.—We desire to object on the ground that no proper foundation has been laid relative to

the transaction by Mr. Davis in that behalf. My objections may be anticipating the answer.

The COURT.—Yes, the question is entirely proper. The answer may develop something that you may object to.

A. Mr. Davis, of the firm of Meador & Davis, telephoned [164] us that he would like to have us execute the bond as surety, and he asked me if we would like to have us execute the bond as surety, and he asked me if he would be in the office and discuss the matter with him. On that day, or the next day—perhaps it was the next day—Davis came over to the office with the form of bond he wanted executed, and stated that there would be no liability to our company, that the case would be taken care of in the event it was affirmed, and under those representations we signed the bond.

Mr. SCOTT.—We move that the answer go out as immaterial, irrelevant and incompetent, no proper foundation for the introduction of such evidence being laid, it not being shown that Mr. Davis was anything other than representing the Pacific Coast Casualty Company in the defense of this damage suit, and as such attorney at law I think the rule of law is well settled that he has no authority to bind his client in the matter of entering into an agreement for an appeal bond.

The COURT.—Well, you will find, Mr. Scott, that the strictness of that rule has become very much relaxed in the recent years when attorneys perform so many functions of a character more or less not strictly within the lines of the duties of attorneys

at law; they act as attorneys at law, and attorneys in fact combined, as attorneys at law and agents combined. I do not think I would be justified in striking that out. Of course it will not be admitted to the prejudice of any legitimate objection to its aspect as showing authority hereafter, but it is a circumstance which I think would bear upon the question of authority, and I would not be permitted to strike it out. **[165]**

Motion denied."

(To said ruling of said Court, defendant thereupon duly excepted.)

XI.

The Court erred in overruling defendant's objection to question propounded to witness Stephenson on the ground that the same is immaterial, irrelevant and incompetent, that no proper foundation for the introduction of such evidence was laid, it not being shown that Davis was anything other than a representative of Pacific Coast Casualty Company, in the defense of the Sowders damage suit, and that as such attorney at law he had no authority to bind the defendant in the matter of an appeal bond. In this connection, the following proceedings occurred:

"Q. In whose behalf did Davis represent himself to be acting in applying to you for the execution of this supersedeas bond?

Mr. SCOTT.—We make the same objection to that, your Honor.

The COURT.—You understand you cannot prove an agency by the declarations of the agent.

Mr. LOCKE.—Of course not. It is simply one of the circumstances.

The COURT.—I think that it is admissible as a part of the transaction.

Mr. SCOTT.—If, your Honor, anyone properly authorized by this defendant were present or participated in this transaction then I concede it might be, but to bring in here circumstances of this kind without first laying a foundation showing that our properly **[166]** authorized representative was present—

Mr. LOCKE.—There can be authority by ratification.

The COURT.—I don't think that would be essential. The question is more as to the effect of the evidence rather than its admissibility. I will let it stand."

(To said ruling of said Court, defendant thereupon duly excepted.)

XII.

The Court erred in overruling the defendant's objection to question propounded to witness Stephenson with reference to the usages and practices in Dallas, Texas, with respect to the procurement by attorneys at law of the execution by surety companies on appeal bonds for their clients. In this connection the following proceedings occurred.

"Q. That is the practice in that regard?

Mr. SCOTT.—We object to that as immaterial, irrelevant and incompetent, not binding upon the defendant in any manner.

The COURT.—I do not see the materiality of that.

Mr. LOCKE.—The proposition is this: For the authority of Davis to execute this bond *re* rely upon three things: First, original authority, under evidence that has not yet come in; and secondly, a holding out, under the customs of business there prevailing; and thirdly, a ratification by the use of this bond, even though originally unauthorized, paying for it, etc. This question is directed to the proposition of holding out, whether it was in accordance with the customs prevailing there.

The COURT.—We all know that, as a matter of common knowledge, that not only in Texas, but that generally attorneys [167] do those things: I don't think that would be admissible, that the usual custom and habit of attorneys in that respect would be admissible to show an agency in a particular instance.

Mr. LOCKE.—It might show a holding out.

Mr. SCOTT.—We have not created the custom.

The COURT.—I will sustain that objection.

Mr. LOCKE.—The plaintiff will except. Then he states what the custom is, and I suppose that will go out, also, your Honor.

The COURT.—Yes.

Mr. LOCKE.—Then I ask him a further question as to whether the usage he had described is the general usage obtaining with other insurance companies, and he said it was.

The COURT.—Well, I don't know about that; just read that testimony.

Mr. LOCKE.—I am reading the testimony so that your Honor will understand what it is. The first

question that was objected to was whether he was familiar with the usages and practices, and he said he was, and then he describes it, as follows; and then he answers as to the general usage.

Mr. SCOTT.—We make the same objection to that, that it is immaterial, irrelevant and incompetent, and not evidence which would bind this company.

The COURT.—I do not think this question goes to the matter of the specific authority of Davis to sign the indemnity agreement; that will have to be gathered from the whole case. I think, though, that this is perfectly competent to show what the usual method was of proceeding to procure such a bond as [168] that. That is all this witness is testifying to, in fact.

Mr. SCOTT.—I don't see how evidence of that character is very material in the case.

The COURT.—Mr. Scott, where it is sought to prove an ultimate fact from a general course of dealing, it may all be material; I will let it go in.

Mr. LOCKE.—That applies to the preliminary question, also, the whole examination.

The COURT.—Yes, I will withdraw the previous ruling and let it go in.

A. Such matters are usually taken up by us with the company's attorney. I don't believe I have ever executed one where the company took the matter up with us direct."

(After such ruling by said Court, defendant thereupon duly excepted.)

XIII.

The Court erred in overruling the defendant's objection to a question propounded to witness Stephenson with respect to the practice of insurance companies in furnishing appeal bonds. In this connection the following proceedings occurred:

"Q. Please state whether the usage you have described as obtaining in the office of your own company is within your knowledge the general usage obtaining in the office of other insurance companies in this locality?

Mr. SCOTT.—Same objection, that it is immaterial, irrelevant and incompetent, not binding upon the defendant in any manner.

The COURT.—Objection overruled. **[169]**

A. So far as I have any knowledge, it is."

(To such ruling of said Court, defendant thereupon duly excepted.)

XIV.

The Court erred in overruling the defendant's objection to question propounded to witness Stephenson, as to what information he had at the time of executing the appeal bond concerning the nature and extent of the authority of Davis. In this connection the proceedings were as follows:

"Q. Please state what, if any, information you had at the time of executing this appeal bond concerning the extent and nature of the authority of Mr. Davis to represent the Pacific Coast Casualty Company in the matter of getting the supersedeas appeal bond.

Mr. SCOTT.—We object to that as immaterial, irrelevant and incompetent.

The COURT.—That ought to be right in your line. If he has any authority he will state it. Let it go in.

A. We understood he had full authority to act for the Pacific Coast Casualty Company in the matter of procuring a surety on the proposed appeal bond.

Mr. SCOTT.—We move that that go out as not responsive to the question. It does not state the information, it simply states his conclusion.

The COURT.—I will hear the balance of it, and see what it shows."

(Thereupon defendant duly excepted.) **[170]**

XV.

The Court erred in overruling defendant's objection to question propounded to witness Stephenson with respect to the authority of Davis, as follows:

Q. Was the matter of his authority discussed between you?

In this connection the following proceedings occurred:

"Q. Was the matter of his authority discussed between you?

Mr. SCOTT.—Objected to as immaterial, irrelevant and incompetent, and no foundation laid.

The COURT.—The objection is overruled. If it should appear that thereafter the case took a course where the defendant here was bound to know, or it was called to its attention that such a contract had been executed on its behalf by attorney Davis and

they made no objection, or acted upon it as though he was authorized, that would be, in law, a ratification, and if they did not do any thing of the kind, then they cannot be bound by his mere declaration that he acted in certain relations.

A. Our general information was that the Pacific Coast Casualty Company had been represented by Meador & Davis, and that they had power of attorney to execute any paper for them. The exact amount of their power of attorney we did not know, and did not know what their limit was. We supposed they had full authority in this particular case, or in any other case. We had made other bonds for them, and they had never questioned their power of attorney."

(To which ruling of said Court, defendant thereupon duly excepted.) **[171]**

XVI.

The Court erred in overruling defendant's objection to the introduction in evidence of Plaintiff's Exhibit "D" being the contract of indemnity signed by Davis, which was offered in evidence by the plaintiff. Upon said last mentioned document being so offered in evidence, the following proceedings occurred:

"Mr. SCOTT.—We object to the introduction of that paper upon the ground that it affirmatively appears that Mr. Davis did not have authority to sign that as attorney in fact of the Pacific Coast Casualty Company.

The COURT.—I will let that go in subject to the objection."

(After such ruling by said Court defendant thereupon duly excepted.)

The said Plaintiff's Exhibit "D" is in the words and figures following, to wit:

"The State of Texas,
County of Dallas.

"Whereas, heretofore, to wit, on the —— day of ————, the Pacific Coast Casualty Company of San Francisco, California, issued to the Elmo Rock Company of Terrel, Texas, an employer's liability policy, insuring said rock company against loss and expense arising from claims upon the assured for damages on account of bodily injuries suffered or alleged to have been suffered during the period of said policy by any employee of the assured by reason of the prosecution of the work described in said policy, and

"Whereas, during the period of said policy, one of the employees of said assured, to wit, J. B. Sowders, was injured by reason of the prosecution of the work described in said policy; and, whereas the said J. B. Sowders brought suit against said rock company and recovered a judgment of $5,000.00 in the District Court of Kaufman County, Texas; and, whereas, the said Pacific Coast Casualty Company believes that said judgment is erroneous and that no liability exists by reason of said injury sustained by said Sowders, and has employed John Davis, an attorney at law, Dallas, Texas, to perfect an appeal from said judgment and prosecute the same to effect; and, whereas a supersedeas bond of $11,000.00 is required to perfect said appeal, and the General

Bonding & Casualty Insurance Company of Dallas, Texas, in consideration [172] of this agreement and other considerations, has agreed to execute said supersedeas bond as surety; Now

"Therefore, in consideration of said agreement and other good and valuable considerations, the said Pacific Coast Casualty Company does hereby agree and obligate and bind itself to indemnify, and keep indemnified, the said General Bonding & Casualty Insurance Company against any and all loss, costs, charges, counsel fees, damages and expenses whatever, which said bonding company shall or may sustain or be put to at any time by reason or in consequence of having executed said supersedeas bond as surety.

"Witness its hand, this 6th day of August, 1912.

"PACIFIC COAST CASUALTY COMPANY.

By JOHN DAVIS,
Its Attorney at Law and in Fact."

XVII.

The Court erred in overruling the defendant's objection to the introduction in evidence of assignment of insurance policy by Elmo Rock Company to plaintiff. Upon said last-named document being so offered in evidence, the following proceedings occurred:

"Mr. SCOTT.—I would like to make a formal objection to that on the ground that the policy, by the terms thereof, is not assignable, and on the ground that this assignment cannot be made the basis of a cause of action against this defendant for the reason

that no payments have been made by the assignees under the terms of this assignment or under the terms of the policy, but that the payment of the judgment by the assignee was a payment made prior to the assignment made on October 22, of this year, whereas the assignment was of November 4, 1913, and such payment is as to the Pacific Coast Casualty Company the payment of a volunteer; that the instrument is immaterial, irrelevant and incompetent as to the Pacific Coast Casualty Company; that furthermore, the assignment appears from the evidence of the plaintiff to have been made in pursuance of a scheme to enable [173] the assured by the assurance and the collusion of the General Bonding Company to avoid and escape its obligation under the policy to make the payment within a certain specified time after the judgment became final.

The COURT.—How is that?

Mr. SCOTT.—It seems that from the evidence as now disclosed in the case, that a stockholder of the assured company, in order to prevent the assured paying the judgment, as according to the terms of its policy it was required to do, threw it into some sort of a proceeding whereby it had a receiver appointed, *an* and is now holding its property in *statu quo,* allowing the bonding company to make the payment while it allows the receiver to preserve its property intact until this suit is disposed of.

The COURT.—There is not enough evidence to show collusion thus far; what you may show thereafter, I cannot tell.

Mr. LOCKE.—And there is no pleading of collusion.

The COURT.—No, there is no pleading of collusion. I will permit it to go in.

Mr. LOCKE.—This is a little out of order, but I might as well finish this document as long as I am at it.

(Continues reading.)

There is a copy of that attached to the pleadings.

The COURT.—What is the necessity of putting in these papers that are attached to the pleadings and that are not in any wise denied?

Mr. LOCKE.—As I understand the California proceedings, they are not denied; but there is a denial on information and [174] belief by which the defendant has undertaken to put on us the burden of proving these things.

The COURT.—There are a lot of denials in the answer that are not good under our practice.

Mr. SCOTT.—This is a foreign record, your Honor.

The COURT.—That does not make any difference. You cannot deny for want of knowledge. If you have a witness back there you would have to send for him or take his deposition. You have the same facilities for examining them.

Mr. LOCKE.—I construe the statute of California as your Honor construes it, but I prefer to take the safe side and put these things in.

The COURT.—Very well."

(To which ruling by said Court, the defendant thereupon duly excepted.)

XVIII.

The Court erred in denying defendant's Motion for a Nonsuit, which Motion was as follows:

"Mr. SCOTT.—The defendant as this time desires to move your Honor for a nonsuit in this case upon the following grounds:

That it appears from the evidence affirmatively that Mr. Davis was not authorized to sign an indemnity agreement or to secure a bond on behalf of this defendant, the Pacific Coast Casualty Company.

That is affirmatively appears from the evidence that this lack of authority was brought to the notice of the General Bonding Company at the time the bond was applied for by Mr. Davis and issued, on the ground that Mr. Davis was not the agent of the defendant, the Pacific Coast Casualty Company, in that transaction; [175] on the further ground that the assignment or purported assignment of the policy of insurance to the General Bonding Company is invalid and void, that said policy of insurance was not assignable at that time, that said policy of insurance is a policy of indemnity against loss by the assured, the Elmo Rock Company; that the Elmo Rock Company has never suffered loss, has never been called upon to pay and has never paid anything in connection with the case of Sowders vs. Elmo Rock Company.

Upon the further ground that it appears affirmatively that the Elmo Rock Company was unable to pay the judgment and was insolvent. On the further ground that it appears affirmatively that the General Bonding Company and the Elmo Rock Company

co-operated in an effort whereby the Elmo Rock Company did not pay and was not called upon to pay the judgment in the case of Sowders vs. The Elmo Rock Company. That said action taken at the instance of the Elmo Rock Company and with the co-operation of the plaintiff herein was designed specifically to deceive this defendant."

(To said ruling of said Court, this defendant thereupon duly excepted.)

XIX.

The Court erred in overruling and denying defendant's petition for a new trial in said action, to which ruling the defendant then and there duly excepted.

And defendant now specifies the particulars in which the evidence was insufficient to justify the decision of the Court, as follows:

I.

Under this, the first specification, defendant claims [176] that the evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Miller-Stemmons Company procured an indemnity bond from the defendant, through attorneys Meador & Davis; that the evidence shows that Meador & Davis were not the attorneys in fact of defendant and were not authorized to give an indemnity bond on behalf of the defendant.

II.

The evidence is and was insufficient and there is no evidence to sustain the finding of the Court that Miller-Stemmons Company or Meador & Davis were authorized by J. B. Seinsheimer & Company to have an indemnity bond executed for the reason that the evidence shows that the defendant declined to au-

thorize either Miller-Stemmons Company or Meador & Davis to furnish an indemnity bond, and that the evidence further shows that J. F. Seinsheimer & Company were not authorized to issue indemnity bonds on behalf of the defendant causalty company.

III.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that as an inducement to the issuance of the supersedeas appeal bond, Davis gave to plaintiff an indemnity contract, set forth in said findings, for the reason that the evidence shows that said alleged indemnity contract was not given as an inducement to the issuance of said supersedeas bond, but was given by Davis subsequent to the issuance of said bond.

IV.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that John Davis was the attorney in fact of the defendant, for the reason that [177] the evidence shows that said John Davis never had any authority other than that of an attorney at law, employed by defendant to defend Elmo Rock Company.

V.

The evidence was and is insufficient and there is no evidence to sustain the finding that Stephenson was not shown the defendant company's letter of June 28th, 1912, to its attorneys for the reason that the evidence shows that said letter was delivered to Stephenson by Davis at the time that Davis made application for the supersedeas bond and said letter was held by Stephenson until the taking of his deposition in this case.

VI.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Stephenson was not in any way made aware of any limitations upon the authority of Davis, for the reason that the evidence shows that Davis told Stephenson he had no authority to execute an indemnity contract, and said Davis delivered to said Stephenson at the time of executing the indemnity contract dated August 6th, 1912, the letter dated June 28th, 1912, from defendant, denying him authority to procure the supersedeas bond.

VII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Stephenson dealt with Davis in the supposition that his authority was that which was usual in such cases, for the reason that the evidence does not show that Stephenson dealt with Davis under any misapprehension as to his authority, nor does the evidence show that it was usual for an attorney at law to have authority to [178] procure supersedeas bonds and execute indemnity contracts in their clients' names.

VIII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that authority to execute the indemnity contract was apparently possessed by Davis, for the reason that the evidence shows that Davis had no apparent authority to execute an indemnity contract on behalf of this defendant.

IX.

The evidence was and is insufficient and there is no

evidence to sustain the finding of the Court that Leeds was an agent of this defendant, for the reason that the evidence shows that said Leeds was an insurance broker and acted in the premises without any authority from this defendant, and as an agent of plaintiff, if of either of the parties.

X.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that this defendant knew of the execution by John Davis of the indemnity contract dated August 6th, 1912, at any time prior to the commencement of the above-entitled action, for the reason that the evidence shows that John Davis executed said contract without authority from the defendant, and the evidence does not show that defendant even knew of the execution of the same.

XI.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that defendant ratified the giving of said indemnity contract dated August 6th, [179] 1912, by John Davis, as attorney in fact of defendant, for the reason that the evidence shows that this defendant never knew of the making of said contract prior to the commencement of this action, and that this defendant paid the premium on the supersedeas bond merely as a part of the expenses arising from claims upon the assured, which expenses were embraced within the terms of the policy of Employer's Liability Insurance Number ME 36,696.

XII.

The evidence was and is insufficient and there is no

evidence to sustain the finding of the Court that plaintiff paid the judgment rendered against plaintiff and Elmo Rock Company at the special request of the Receiver of Elmo Rock Company, for the reason that the evidence shows that plaintiff paid said judgment after writ of execution duly issued and under compulsion of law.

XIII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that the Receiver of Elmo Rock Company assigned to plaintiff the employer's liability policy issued by the defendant, for the reason that said policy was one insuring Elmo Rock Company against loss on account of bodily injuries suffered by its employee, and said policy was not assignable by Elmo Rock Company until loss had been sustained by said company.

XIV.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that the property of Elmo Rock Company levied upon by the sheriff and held by the Receiver was worth Nineteen Thousand ($19,000) Dollars. [180]

XV.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Elmo Rock Company was solvent and able to pay the judgment recovered by Sowders at the time execution was levied upon the property of said Elmo Rock Company, for the reason that the evidence shows that said Elmo Rock Company was insolvent at said time.

XVI.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Elmo Rock Company sustained loss or expense in the action entitled "Sowders versus Elmo Rock Company," for the reason that the evidence shows that the Elmo Rock Company incurred no expense and suffered no loss in said action.

XVII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that loss or expense was actually sustained and paid in satisfaction of a final judgment by Elmo Rock Company within ninety days from the date of said judgment, and after trial of the issue, for the reason that the evidence shows that said Elmo Rock Company did not sustain and pay any loss or expense in satisfaction of any final judgment, and the evidence shows that no such loss or expense was paid within ninety days from the date of said judgment and after trial of the issue.

XVIII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Miller-Stemmons Company were acting under J. F. Seinsheimer & Company of Galveston, Texas, defendant's general agents, for the reason that the evidence shows that Miller-Stemmons Company were merely [181] solicitors of insurance and that they were not the agents of defendant.

XIX.

The evidence is and was insufficient and there is no

evidence to sustain the finding of the Court that it was the duty of defendant to furnish the supersedeas bond in taking an appeal from the judgment in the action of Sowders versus Elmo Rock Company for the reason that the policy of insurance issued by defendant does not provide that defendant would furnish said bond and it does not require defendant to pay or to guarantee the payment of the judgment in an action for personal injuries until said judgment has become final and has been paid by the assured.

WHEREFORE the said PACIFIC COAST CASUALTY COMPANY, a corporation, defendant, prays that the said judgment of the District Court of the United States, for the Northern District of California, may be reversed.

MYRICK & DEERING,
JAMES WALTER SCOTT,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 28, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [182]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,723.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY,
Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,
Defendant.

Order Allowing Writ of Error and Fixing Amount of Bond.

On this 28th day of October, 1915, came the defendant in the above-entitled action, Pacific Coast Casualty Company, a corporation, by its attorneys, and having filed in said action and presented to the undersigned its petition praying for the allowance of a writ of error, and having filed and presented with it an assignment of errors and specifications of certain insufficiencies of the evidence intended to be urged by it, praying that a transcript of the records, proceedings and papers on which the judgment in this action was rendered, duly authenticated, may be sent to the United States Court of Appeals, for the Ninth Circuit, and that such other and further proceedings may be had as may appear proper in the premises,

Now, therefore, on consideration thereof, the Court does allow the writ of error upon the giving by the defendant of a bond in the sum of Twelve Thousand Six Hundred ($12,600) Dollars, which said bond shall operate as a supersedeas bond.

WM. C. VAN FLEET,

Judge of the United States District Court, for the Northern District of California, Second Division.

[Endorsed]: Filed Oct. 28, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [183]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,723.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, Pacific Coast Casualty Company, a corporation, as principal, and the United States Fidelity and Guaranty Company, a corporation, as surety, are held and firmly bound unto General Bonding and Casualty Insurance Company, a corporation, in the penal sum of Twelve Thousand Six Hundred ($12,600) Dollars, for the payment of which well and truly to be made we hereby jointly and severally bind ourselves and assigns firmly by these presents.

The condition of the foregoing obligation is such, that whereas the above-named principal sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, in the above-entitled action, to reverse the judgment heretofore rendered therein on the 15th day of September, 1915, and now desires to give bond and security as required by the order of the Court, to operate as a supersedeas and to stay the execution of the judgment in said action.

NOW THEREFORE, if the said Pacific Coast

Casualty Company, a corporation, shall prosecute its writ to effect and if it fails to make its plea good, shall answer all damages and costs, then this obligation to be void, otherwise to remain in full force and effect. [184]

IN WITNESS WHEREOF the parties hereto have caused their signatures to be hereunto attached this 28th day of October, 1915.

PACIFIC COAST CASUALTY COMPANY.
By T. L. MILLER,
President,
[Seal] By ALLEN I. KITTLE,
Secretary.

UNITED STATES FIDELITY AND GUARANTY COMPANY.
By H. V. D. JONES,
Attorney in Fact.
[Seal] By B. F. CATOR,
Attorney in Fact.

Approved October ——, 1915.

_____,
District Judge.

Approved this 28th Oct. 1915.
WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Oct. 28, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [185]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,723.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

Order Approving Bond and Directing the Issuance of the Writ of Error.

The defendant in the above-entitled action having this day presented its bond for a writ of error to operate as a supersedeas, with the United States Fidelity and Guaranty Company, a corporation, as surety, and the said bond having been approved by me and filed,

IT IS NOW ORDERED that the writ of error issue and that all proceedings on the said judgment in the said cause be stayed, pending the prosecution and hearing of the said writ of error.

Ordered and adjudged this 28th day of October, 1915.

WM. C. VAN FLEET,

Judge of the District Court of the United States, for the Northern District of California, Second Division.

[Endorsed]: Filed Oct. 28, 1915. W. B. Maling, Clerk. By J. A Schaertzer, Deputy Clerk **[186]**

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,723.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify that the foregoing one hundred eighty-six (186) pages, numbered from 1 to 186, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $125.40; that said amount was paid by Myrick & Deering, Esqrs., attorneys for defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District

Court, this 10th day of January, A. D. 1916.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Ten-cent Internal Revenue Stamp. Canceled Jan. 10, 1916. J. A. S.] [187]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division. Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Pacific Coast Casualty Company, Plaintiff in Error, and General Bonding and Casualty Insurance Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said Pacific Coast Casualty Company, a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with

this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 28th day of October, in the year of our Lord one thousand nine hundred and fifteen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
United States District Judge. [188]

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain

schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

Due service of the within Writ of Error, and receipt of a copy thereof, is hereby admitted this 29th day of October, 1915.

LOCKE & LOCKE,
R. S. GRAY,
Attorneys for Defendants in Error.

[Endorsed]: No. 15,723. United States District Court for the Northern District of California, Second Division. Pacific Coast Casualty Company, Plaintiff in Error, vs. General Bonding and Casualty Insurance Company, Defendant in Error. Writ of Error. Filed Nov. 3, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Citation on Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to General Bonding and Casualty Insurance Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error

duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein Pacific Coast Casualty Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 28th day of October, A. D. 1915.

WM. C. VAN FLEET,
United States District Judge. [189]

Due service of the within Citation on Writ of Error, and receipt of a copy thereof, is hereby admitted this 29th day of October, 1915.

LOCKE & LOCKE,
R. S. GRAY,
Attorneys for Defendants in Error.

[Endorsed]: No. 15723. United States District Court for the Northern District of California, Second Division. Pacific Coast Casualty Company, Plaintiff in Error, vs. General Bonding and Casualty Insurance Company, Defendant in Error. Citation on Writ of Error. Filed Nov. 3, 1915. W. B. Maling, Clerk, By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2735. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Coast Casualty Company, a Corporation, Plaintiff in Error, vs. General Bonding and Casualty Insurance Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed January 14, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit,
By Meredith Sawyer,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC COAST CASUALTY COMPANY,
Plaintiff in Error,

vs.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,
Defendant in Error.

Stipulation [and Order] Extending Time to [January 10, 1916 to] Prepare, Serve and File Transcript.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that in view of the delay necessitated in the preparation, settlement and allowance of the bill of exceptions in the above-entitled matter, the time which plaintiff in error may

have within which to prepare, serve and file its transcript of record herein, and the time within which said cause shall be docketed, may be and the same is hereby extended to and including the 10th day of January, 1916.

Dated November 26, 1915.

MYRICK & DEERING,
JAMES WALTER SCOTT,
Attorneys for Plaintiff in Error.
R. S. GRAY,
LOCKE & LOCKE,
Attorneys for Defendant in Error.

Upon reading the foregoing stipulation IT IS SO ORDERED.

WM. W. MORROW.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Pacific Coast Casualty Company, Plaintiff in Error, vs. General Bonding & Casualty Insurance Company, Defendant in Error. Order and Stipulation Extending Time to Prepare, Serve and File Transcript. Filed Nov. 27, 1915. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC COAST CASUALTY COMPANY,
Plaintiff in Error,

vs.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,
Defendant in Error.

Stipulation [and Order] Extending Time to [February 15, 1916, to] Prepare, Serve and File Transcript.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that in view of the delay necessitated in the preparation, settlement and allowance of the bill of exceptions in the above-entitled matter, the time within which plaintiff in error may have within which to prepare, serve and file its transcript of record herein, and the time within which said cause shall be docketed, may be and the same is hereby extended to and including the 15 day of February, 1916.

Dated January 8, 1916.

MYRICK & DEERING,
JAMES WALTER SCOTT,
Attorneys for Plaintiff in Error.
LOCKE & LOCKE,
R. S. GRAY,
Attorneys for Defendant in Error.

Upon reading the foregoing stipulation IT IS SO ORDERED.

WM. W. MORROW,
U. S. Circuit Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Pacific Coast Casualty Company, Plaintiff in Error, vs. General Bonding & Casualty Insurance Company, Defendant in Error. Order and Stipulation Extending Time to Prepare, Serve and File Transcript on Appeal. Filed Jan. 8, 1916. F. D. Monckton, Clerk.

No. 2735. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to February 15, 1916, to File Record Thereof and to Docket Case. Refiled Jan. 14, 1916. F. D. Monckton, Clerk.